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Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DCX, INC.,
Petitioner,

v.

WILLIAM J. PERRY,
SECRETARY OF DEFENSE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 14, 1996

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130 pp

QUESTION PRESENTED

Whether the Federal Acquisition Regulations ["FAR"] are subject to the Administrative Procedure Act ["APA"], thereby conferring rights in the FAR's procedure for default, 48 CFR §49.402-3, upon government contractors.

PARTIES TO THE PROCEEDING

The petitioner, named in the caption, was plaintiff and appellant below. DCX, Inc. is a publicly traded corporation. DCX, Inc. owns one closely held subsidiary, GeoStar International, Inc., doing business as GeoNova International, Inc.

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The ASBCA concurred with DCX's assertion that the power supply and distribution contracts were impossible to build to government specifications and ordered conversion to termination for convenience of the government; but the termination for default of the light set contract was affirmed because the Federal Circuit, without reference to the Administrative Procedure Act, found that the

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PETITION FOR A WRIT OF CERTIORARI

DCX, Inc. petitions the Court that a writ of certiorari issue to review the judgment rendered in this case by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals on the appeal of the ASBCA's decision is reported at 79 F.3d 132 (Fed. Cir. 1996) (App. 3a). The Order denying the petition for rehearing and the suggestion for rehearing *en banc* is unpublished (App. 1a). The Opinion of the Armed Services Board of Contract Appeals on Motion for Reconsideration is published at 94-2

BCA (CCH) ¶26,867 (April 19, 1994) (App. 12a), and on appeal of the termination for default at 94-2 BCA (CCH) ¶26,661 (January 31, 1994) (App. 15a). The related opinion in ASBCA No. 37669 and ASBCA No. 37670 (consolidated) is reported at 92-3 BCA (CCH) ¶25,125 (May 19, 1992) (App. 35a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1996 (App. 3a). The Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* were denied on May 16, 1996 (App. 1a). This Court's jurisdiction is invoked under 28 USC §1254(1).

STATUTES INVOLVED

The relevant statutes and regulations are reprinted in the Appendix at pages 77a-90a bound with this brief.

STATEMENT

The question presented arises on appeal of a termination for default by the Defense General Supply Center ["DGSC" or "Government"].

The Government and DCX entered into three related contracts for the manufacture of electrical components for the TEMPER medical tent: two for the power distribution systems and one for fluorescent light sets.

From the fall of 1987 through the spring of 1988, petitioner, DCX, Inc. ["DCX"], was awarded three related contracts for production of TEMPER medical tent electrical

systems. Two of the contracts involved electrical power supply and distribution systems, while the third, the subject of this petition, was for fluorescent light sets.

The first two contracts became embroiled in an acrimonious dispute concerning whether the power supply and distribution system contracts could be built to the government's specifications. When it appeared that these two contracts might be terminated for default, DCX requested a meeting with the Government to discuss technical issues. The DGSC refused. The meeting occurred only after the intercession of higher command authorities, and extensive technical exchanges then followed between DCX, the DGSC, and the technical command, the Natick Army Research and Development Center. By early July 1988, only three or four of the original 155 engineering problems remained outstanding. While DCX attempted to resolve its technical differences with the Government, DCX proceeded, as required by the third contract's delivery schedule, with production of the light sets.

The light set contract required DCX to prepare a First Article Test Report ["FATR"], the purpose of which was to ensure that DCX light sets would meet certain established government performance standards. In the ordinary course of government contracting, the Government schedules sufficient time between the Government's acceptance of the FATR and the initial delivery of assembled units for the contractor to procure materials and manufacture the item. The schedule of this contract was unusual, in that the short lead times imposed by the delivery schedule of the contract necessarily required the contractor to procure materials and manufacture units prior

to FATR approval.[1]

When a contractor procures materials and manufactures units prior to the Government's acceptance of an FATR, it does so at its own peril. If a first article test unit proves technically deficient, then the contractor must make all necessary corrections at its own expense. DCX knowingly accepted this risk at the time of contract award because it was confident of its ability to perform. Having successfully designed and built such projects as the command and control cable for the Saturn V Apollo moon rocket launch, which allows the command center at the Kennedy Space Center to control the vehicle on the launch pad; the warming harness for the Navy's standard missile system, which initiates and monitors a self-diagnostic system; and the electronic release control mechanism for the F-16 smart bomb ordinance, which enables the pilot to arm and target the bomb; DCX believed that a fluorescent light set fixture posed no serious technical challenge for its engineering staff. If the FATR had proved technically deficient, then DCX would have lost any investment necessary to correct the deficiency; if the Government, in its discretion, had terminated the contract for technical deficiencies of the FATR, then DCX would have lost

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[1]In this case, the light set contract was awarded April 1, 1988. The FATR was due on June 30, 1988. The Government reserved thirty days for review and approval of the FATR, leaving approximately twenty days for DCX to procure sufficient materials and build one thousand units for the first delivery, scheduled for August 19, 1988, and an additional one thousand units each week thereafter through November 4, 1988. Critical materials, such as chassis, channels, end caps, and bushings, could only be procured in sufficient quantity after a lead time of seven to ten weeks.

its entire investment.

DCX subcontracted the testing activities to Ball Aerospace Corporation ["Ball"], one of the nation's premier testing laboratories and the only facility in that region of the country with environmental testing chambers capable of accommodating the light set's oversized dimensions. Ball interrupted testing of the light sets due to conflicting demands placed upon its facilities by the arrival of unforeseen work from highly classified government satellite contracts. Ball advised DCX that those other government contracts had higher priority ratings under the Defense Priorities and Allocations System ["DPAS"], 15 CFR §350 *et seq*. DCX advised the DGSC of the nature of the delay, and the DGSC agreed to forbear delivery of the FATR until July 12, 1988.

When the light set contract verged on technical default, coinciding with an acrimonious design dispute related only to the other two contracts, the Government moved immediately to terminate all three contracts for default.

In the midst of the technical discussions concerning the two power supply and distribution contracts, and without prior notice, the two contracts were terminated for default on July 12, 1988. That same day, the purchasing contracting officer instructed the termination contracting officer to terminate the light set contract for default. The termination contracting officer began his work on the termination at seven a.m. on July 13, 1988, and issued the notice of termination for default at approximately noon that day.

According to the Federal Acquisition Regulations ["FAR"], to terminate a contract for default, the termination contracting officer must consider whether the delay was excusable, as well as the other factors enumerated by the

FAR, including:

> (1) The terms of the contract and applicable laws and regulations.
>
> (2) The specific failure of the contractor and the excuses for the failure.
>
> (3) The availability of the supplies or services from other sources.
>
> (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
>
> (5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
>
> (6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
>
> (7) Any other pertinent facts and circumstances.

48 CFR §49.402-3(f). He then must obtain substantive legal review of his termination memorandum, which requires legal review of the entire contract file by the Government's counsel.

In order to terminate the DCX contract, the termination contracting officer testified that he: searched the mail room for the FATR; prepared a written memorandum of termination; had the memorandum typed by his secretary; submitted the finished memorandum and the entire contract file for substantive legal review; met with the DGSC's counsel;

and finally, prepared, typed and transmitted to DCX a separate termination notice.

Whether the legal review was ever obtained remains disputed; the perfunctory nature of the DGSC's hasty evaluation, however, is not. In fact, the termination contracting officer testified that he completed the entire termination process in less than five hours. Although the termination contracting officer produced a memorandum ostensibly addressing each of the factors required by the FAR, by his own admission he did not make any factual inquiry; the memorandum merely presented unsubstantiated conclusions.

For example, the termination contracting officer apparently believed that once the Government agrees to forbear late delivery because of excusable delay, a termination contracting officer has no obligation to make inquiries as to the excusability of any subsequent delay. Any investigation in this case by the termination contracting officer would have shown that the delay continued as a result of the same government caused interference -- environmental testing of the highly classified government satellite components -- for which the forbearance had previously been granted; that the unit was in test chamber and in the second-to-last day of the testing period for the final test; and that a memorandum to that effect from DCX was on his supervisor's desk. It seems this did not matter to the termination contracting officer as he further testified that he would *not* have excused the delay for any reason, even if he knew it had been caused by the Government itself.

Additionally, in the memorandum of termination, the termination contracting officer concluded that DCX did not have the financial capacity to complete the contract. At the ASBCA hearing, however, he admitted that although he had concerns about DCX's financial status in light of the default

terminations of the power supply contracts, he had made *no* inquiry regarding the financial status of the company.

Furthermore, in his haste, the termination contracting officer *failed* to consider that a Defense Department industrial specialist from a sister command had reported to the DGSC that DCX's production of finished units was 67% complete as of May 24, 1988. Thus, the brief delay in the delivery of the FATR would not have affected the initial August 1, 1988 product delivery requirement.

Finally, further compounding the DGSC's error, the termination contracting officer *failed* to consider that time was no longer of the essence for the light set contract. As a result of defective government fabric specifications, the newly procured tents into which the electrical components were to be placed leaked so badly that they had to be replaced.

The ASBCA concurred with DCX's assertion that the power supply and distribution contracts were impossible to build to government specifications and ordered conversion to termination for convenience of the government; but the termination for default of the light set contract was affirmed because the Federal Circuit, without reference to the Administrative Procedure Act, found that the procedural requirements of the FAR are not mandatory and do not confer rights on the contractor.

With respect to the two power supply and distribution system contracts, the ASBCA held that DCX correctly asserted that neither contract could be built to government specifications and ordered the terminations for default converted to terminations for the convenience of the government. *See Appeal of DCX, Inc.*, ASBCA Nos. 37669

and 37670 (consolidated), 92-3 BCA (CCH) ¶25,125 (May 19, 1992) (App. 35a). The government did not appeal that decision. The Federal Circuit and the ASBCA, however, upheld the termination for default of the light set contract, even though the termination for default was made on the heels of the other default terminations. In fact, the decision was made in such extraordinary haste that the termination contracting officer, by his own admission, made no factual inquiries into any of the factors mandated by the FAR, and he further testified that he based his decision to terminate in part upon DCX's alleged lack of reliability in the power supply and distribution contracts.

Although the Federal Circuit recognizes that termination for default is "draconian," in this case, it upheld a termination in which the termination contracting officer "considered" the factors mandated by the FAR, but made no factual inquiries or reasoned assessments in support of his conclusions. Conclusions made without reasoned inquiry, as contemplated by the APA, are arbitrary and capricious. In reaching this result, the Federal Circuit held that a contractor has no rights in the FAR's default procedures, *ergo,* that the FAR is not subject to the APA.

This case exposes the need for the Court to clarify that the FAR is subject to the APA; that government contractors enjoy the protection of the FAR's default termination procedures; and that a termination for default requires the exercise of discretion based upon reasoned factual inquiry.

REASONS FOR GRANTING THE WRIT

I. THE FAR'S DEFAULT TERMINATION PROCEDURES ARE SUBJECT TO THE APA; THEREFORE, THE OPINION BELOW THAT THE FAR CONFERS NO RIGHTS ON CONTRACTORS AND THAT THE GOVERNMENT IS NOT BOUND BY THE FAR'S PROCEDURES IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT; REVIEW BY THIS COURT IS NECESSARY TO RESOLVE THE CONFLICT.

A. The opinion below conflicts with this Court's prior holdings that under the APA, an agency is bound by its own rules and regulations.

A fundamental principle of administrative law is that an agency is bound by its own regulations. The Supreme Court held in *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295 (1979) that "[i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect' of law." A unanimous Supreme Court affirmed this principle most recently in *Lincoln v. Vigil*, 113 S. Ct. 2024 (1993). Favorably discussing an earlier decision, the *Lincoln* Court said, "Although the Bureau's own regulations required it to publish the provision in the Federal Register, the Bureau had failed to do so. *We held that the Bureau's failure to abide by its own procedures rendered the provision invalid . . . .*" *Id.* at 2035 (discussing *Morton* v. *Ruiz*, 415 U.S. 199 (1974)) (emphasis added) (citations omitted).

Furthermore, the principle that a regulation has the effect of a statute has been applied to procedural, as well as substantive, rules. The case law firmly establishes that an

agency is required by law to observe the procedures required by its own regulations. Not only in *Morton v. Ruiz*, but in several other cases, this Court has invalidated action where the agency failed to abide by the procedures established in its own regulations.[2] The lower courts have also invalidated agency actions on the same grounds.[3] This principle has been applied

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[2]*See United States* v. *Nixon*, 418 U.S. 683 (1974) (a legislative rule is binding on the agency that issues it in a case involving special prosecutor's ability to contest executive privilege); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959) and *Service* v. *Dulles*, 354 U.S. 363 (1957) (Secretary of State must follow internal procedures for dismissal of employee); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) (Attorney General cannot sidestep regulations involving delegation of his statutory authority). *But see United States* v. *Caceres*, 440 U.S. 741, 753 n.18 (1979); *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538 (1970).

[3]*E.g., Yesler Terrace Comm'y Council* v. *Cisneros*, 37 F.3d 442, 449-450 (9th Cir. 1994); *Montilla* v. *INS*, 926 F.2d 162 (2d Cir. 1991); *Trahan* v. *Regan*, 824 F.2d 96 (D.C. Cir. 1987); *American Petroleum Institute* v. *EPA*, 787 F.2d 965, 975 (5th Cir. 1986); *Payne* v. *Block*, 714 F.2d 1510 (11th Cir. 1983); *Drukker Comm'ns* v. *NLRB*, 700 F.2d 727, 734 (D.C. Cir. 1983); *Kelly* v. *Railroad Retirement Bd.*, 625 F.2d 486, 491-492 (3d Cir. 1980): *Pacific Molasses Co.* v. *FTC*, 356 F.2d 386, 389-390 (5th Cir. 1966). *But see First State Bank of Hudson County* v. *United States*, 599 F.2d 558, 564 (3d Cir. 1979).

to procedural rules governing radio licensing cases,[4] discharge of government employees,[5] deportation proceedings,[6] railroad retirement and Social Security proceedings.[7]

These cases plainly lay down two propositions: (1) that an agency must follow its own procedural regulations, and (2) that its failure to do so renders its action invalid. The same result is commanded by the APA, which provides in relevant part: "The reviewing court shall . . . (2) *hold unlawful and set aside* agency action, findings, and conclusions found to be . . . (D) *without observance of procedure required by law*." 5 USC §706 (1988) (emphasis added). Therefore, federal agencies, including the DGSC, are bound by their own procedural rules.

B. Under the APA, the FAR's default termination procedures are mandatory and bind government contracting officers.

By publication in the Code of Federal Regulations at 48 CFR Chapter 1, the FAR informs the parties of the process which governs default proceedings, and specifically identifies

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[4]*See Reuters, Ltd.* v. *FCC*, 781 F.2d 946 (D.C. Cir. 1986).

[5]*See Vitarelli* v. *Seaton*, 359 U.S. 535 (1959).

[6]*See United States* v. *Dunton*, 288 F. Supp. (S.D.N.Y. 1923).

[7]*See Hall* v. *Schweiker*, 660 F.2d 116 (5th Cir. 1981); *Kelly* v. *Railroad Retirement Bd.*, 625 F.2d 486 (3d Cir. 1980).

certain relevant factors governing that evaluation. Every individual who enters into a contract with the government relies upon the government adhering to its own published regulations, including the procedural safeguards contained therein. The FAR precludes remedies at common law; therefore, the Government's adherence to applicable procedural requirements in administering contracts is paramount. It is crucial to contractors and the federal government alike that government contracting officers observe these standards to ensure that the process is fair and impartial.

The FAR is not, as the Federal Circuit's opinion would seem to suggest, an internal government document intended only for the use of the government. *See, e.g., First State Bank of Hudson County* v. *United States*, 599 F.2d 558, 564 (3d Cir. 1979). In that case, the Third Circuit differentiated between unpublished guidelines, an FDIC bank examiner's manual intended only for the internal use of the Government, and published regulations that have the force and effect of law.

Likewise, the APA recognizes the distinction between administrative staff manuals and agency rules of procedure by requiring different levels of access to such information. Manuals and procedures intended for internal government use are only required to be available for public inspection and copying, 5 USC §552(a)(2)(C), however, agency rules of procedure must be published in the Federal Register, 5 USC §552(a)(1)(C). The APA specifically contemplates that the publication of agency rules of procedure, such as the FAR, is "for the guidance of the public." *Id.*

In spite of the fact that the FAR is a published regulation, the Federal Circuit, citing to decisions of boards of contract appeals and without referring to the APA, concluded that the government is not bound by the FAR's published procedures for effecting a default termination of a government

contract.

The plain language of the FAR's default termination provision precludes any interpretation that these procedures were intended to be optional. The use of the word "shall" in paragraph (f) and the phrase "[i]f, *after* compliance with the procedures in paragraphs (a) through (f) of this 49.402-3 ...," 48 CFR §49.402-3(g) (emphasis added), demonstrates that the factors enumerated in FAR §49.402-3(f) are a mandatory element of the termination process. *See Fairfield Scientific Corp.* v. *United States,* 611 F.2d 854, 862 (Fed. Cir. 1979) ("Not only is the contracting officer to consider whether the default is excusable, but the regulations require him to consider at least seven factors in addition to the default"); *see also Darwin Constr. Co.* v. *United States,* 811 F.2d 593, 598-99 (Fed. Cir. 1987). The decision to terminate for default is more than a matter of the contractor's lapse into bare technical default; it has long been recognized that contracting officers cannot be "automatons." *John A. Johnson Contracting Corp.* v. *United States,* 132 Ct. Cl. 645, 658-60; 132 F. Supp. 698, 704-05 (1955); *see also Schlesinger* v. *United States*, 182 Ct. Cl. 571, 581; 390 F. Supp. 702, 707 (1968). The termination process must include reasoned consideration of all relevant circumstances in accordance with the factors enumerated in FAR §49.402-3(f).

The boards of contract appeals have repeatedly held that a termination contracting officer's failure to consider one or more of the FAR's seven factors does not automatically require the conversion of a termination for default to a termination for the convenience of the government. Although reasoned consideration of the FAR's seven factors is mandatory, it should not be an exercise of form over substance. If the failure to consider all factors results only in harmless error, with no prejudice to the contractor, conversion

to a termination for the convenience of the government may not be appropriate. However, in this case, there was no exercise of reasoned discretion because the termination contracting officer failed to make any factual inquiry in support of his decision, and the result prejudiced DCX.

On cross-examination, the termination contracting officer admitted that he had made no reasoned inquiry into any of the FAR's factors; he terminated the light set contract for default only because the FATR had not arrived on time. The termination contracting officer, the ASBCA and the Federal Circuit misapplied the law because they assumed that the FAR factors were not mandatory. Consequently, they concluded that because DCX had already received one forbearance on the FATR delivery, the Government had no further duty "to make inquiry or seek out further information about the status of DCX's efforts." 79 F.3d at 135 (App. 9a). Under their reasoning, the termination contracting officer need only consider the excusability of the delay once, upon the original delinquency. Any subsequent delay can result in immediate termination, without further inquiry or exercise of reasoned discretion. Even if the termination contracting officer had made a perfunctory examination of the situation before the forbearance expired, the FAR and the APA require a more demanding inquiry.

This one-forbearance approach is facially inconsistent with the standard of review that flows from the APA, 5 USC §706(2)(D), because the plain language of the FAR requires the exercise of discretion based upon reasoned inquiry into the FAR §49.402-3(f) factors. Under the "one-forbearance" formulation, the termination contracting officer has unlimited authority to terminate for default once a forbearance has been granted, regardless of the exigent circumstances of any subsequent delay.

C. Under the APA, the FAR's default termination procedures confer rights on government contractors.

In addition to finding that the termination contracting officer is not bound by the FAR's default procedures, the Federal Circuit found that "the regulation does not confer rights on a defaulting contractor." 79 F.3d at 135 (App. 8a). This position misstates the law and it is directly contradicted by the unanimous Supreme Court opinion in *Morton* v. *Ruiz*:

> Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. . . . Before [the agency] may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures.

415 U.S. at 235. As discussed above, in 1993 the unanimous Supreme Court in *Lincoln* v. *Vigil* reconfirmed this very aspect of *Morton* v. *Ruiz*, stating: "We held that the Bureau's failure to abide by its own procedures rendered the provision invalid . . . ." 113 S.Ct. at 2035. This Court has thus firmly established that an agency may not refuse to comply with its published standards, especially when noncompliance results in prejudice. *See Lincoln*, 113 S.Ct. at 2024; *Morton*, 415 U.S. at 199.

As the Federal Circuit has recognized, the failure to consider one or more factors in a termination memorandum does not in and of itself require a conversion to a termination for the convenience of the government, 79 F.3d at 135 (App. 8a-9a); prejudice to the contractor is also required. Prejudice results when a termination contracting officer fails to consider factors which favor forbearance or relies upon speculation

rather than verified facts to support the termination decision. In this case, the termination contracting officer produced a memorandum of termination which addressed the factors under FAR, and he stated before the ASBCA that he had in no way acted to substantiate his speculations prior to terminating the light set contract.

Mere speculations do not satisfy APA standards. The APA requires reasoned inquiry, not the mere *pro forma* ticking of a checklist. Reasoned inquiry consists of the evaluation of all relevant information, which was not attempted in this case. A deficient review which prejudices the contractor triggers the contractor's right to a remedy. The remedy in this case is to convert the default termination to a termination for the convenience of the government.

Even a minimal investigation would have revealed DCX's communication with the termination contracting officer's superiors regarding the delayed delivery of the FATR, and should have resulted in another brief forbearance. Production of the light set contract was substantially complete and in inventory; it was unlikely that the Government's legitimate interests would have been better served by terminating the DCX contract. Therefore, the failure to consider DCX's most recent communication, as well as to verify other relevant information, prejudiced DCX.

The role of the FAR is to regularize the contracting process; the opinion below strips any guise of certainty from the default termination procedures by reducing their status to that of a mere guideline for the Government's convenience. The Federal Circuit's conclusion that the FAR confers no rights on a defaulting contractor is a fundamental misassertion of the law. DCX had a right to rely on the Government's adherence to its published regulations, even after one forbearance was granted, and its failure to do so makes its

action in terminating DCX's contract for default invalid.

This Court should grant certiorari to resolve the conflict between its prior holdings that the publication of procedural rules -- such as the FAR -- controls Government action affecting the public and the Federal Circuit's holding that such regulations create no rights for government contractors, even when the failure to adhere to the procedure creates prejudice.

II. GOVERNMENT CONTRACTS ACCOUNT FOR A SUBSTANTIAL PORTION OF THE FEDERAL BUDGET; REVIEW BY THIS COURT IS NECESSARY TO RESOLVE THIS MATTER OF RECURRING NATIONAL INTEREST.

A. Government contracts play a major role in our nation's economy and enable the Government to procure goods and services effectively.

Government contracts constitute approximately fifteen percent of the federal budget.[8] Last year, the federal government spent an average of over $500,000,000 per day on more than eighteen million contracts.[9]

The FAR is the government-wide regulation for federal procurement, both military and civilian. It impacts all

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[8]*See* OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW, REINVENTING FEDERAL PROCUREMENT 2 (September 1993).

[9]FISCAL YEAR 1995 FEDERAL PROCUREMENT REPORT (Fiscal year 1995: $202,301,613,000 on 18,110,079 contracts).

government procurement from stealth aircraft research and development to standard commercial word processing equipment. Its broad reach makes it essential that the precise nature of the FAR's role is clear, both to the government and to the public. The default termination procedures at issue in this case are particularly critical, as a termination for default is a draconian action subjecting the contractor to forfeiture of its investments under the contract, as well as responsibility for the government's excess reprocurement costs.[10] *De Vito* v. *United States*, 188 Ct. Cl. 979, 990; 413 F.2d 1147 (1969).

Furthermore, the impact of a default termination is rarely confined to the affected contractor. For example, DCX had obtained financial assistance from the Small Business Administration ["SBA"] in order to build the materials required by the three TEMPER tent contracts. As a result of this termination, DCX has had to reschedule repayment of the principal, $618,000, and interest, $288,000, of its SBA loan guarantee. DCX has advised its portfolio manager at the SBA that it will seek a waiver of the interest and a reduction of its principal. FAR §49.402-3(f)(6) requires that the termination contracting officer consider "the effect of a termination for default on . . . guaranteed loans." There is no evidence of record to suggest that the termination contracting officer made any inquiry as to whether DCX had utilized loan guarantees to finance production required by the contract, or the impact of

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[10]DCX has filed a claim with the DGSC for materials and labor expended under the contract in excess of $2,000,000; the DGSC has assessed DCX with in excess of $227,000 in reprocurement costs, which assessment has been appealed to the ASBCA. The ASBCA suspended action on the reprocurement assessment pending resolution of this appeal. *Appeal of DCX, Inc.*, ASBCA No. 40904.

the termination for default on the SBA. The DGSC's failure to exercise reasoned discretion when terminating these contracts for default has created a circumstance in which one federal agency, the Department of Defense, has placed another federal agency, the SBA, at risk for significant financial loss.

The DGSC's termination for default of the light set contract also adversely impacted state level programs. DCX participated in the "Buy Colorado" program. Under the program, DCX committed to utilize as many Colorado subcontractors and vendors as was practical in the course of all its government contracting, including the three DGSC contracts. Most of these local businesses have suffered severe financial hardship during DCX's protracted legal battles with the DGSC, and in some cases, small Colorado vendors went out of business.

B. If the FAR's default termination procedures are not mandatory, the reliability of the Government as a contracting partner -- an essential element of an efficient procurement regime -- is significantly diminished.

Contractors are willing to undertake the financial obligations associated with government contracting, in the absence of common-law contractual remedies, because the FAR creates a contracting environment in which the government maintains a reputation for fair dealing. Indeed, the primary purpose of the FAR is to regularize the government contracting process through officially published procedures upon which both the contractor and government contracting officers may rely. As Justice Brandeis observed, "punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." *Lynch* v. *United States*, 292 U.S. 571, 580 (1934).

This Court has recently reaffirmed this principle in *United States* v. *Winstar Corp.*, __ U.S. __; 64 USLW 4739, 4752 (No. 95-865)(July 1, 1996).

In DCX's case, the FAR's default termination procedures were incorporated by reference in the light set contract. DCX relied upon the *Morton* principle that the government would be bound by its own regulations and would observe the FAR's procedures before undertaking a contract which required the advance commitment of $2.5 million in materials and production effort. Concomitantly, the SBA relied on the DGSC's adherence to these procedures before committing to the loan guarantees which DCX utilized to finance its materials and labor obligations for the three DGSC contracts.

When government officials are not bound by the FAR's procedural requirements, as the Federal Circuit held below, the Government gains an unfair bargaining advantage over the contractor by camouflaging the true level of risk. Disclosure of the Government's refusal to adhere to these standards for procurement will have, as in other forms of government contracts, the "certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Winstar*, 64 USLW at 4752.

Furthermore, an established scheme of non-reliance on the FAR's provisions will have a chilling effect on the bidding process. Companies may decide not to assume the risk of arbitrary action by a government official and will remove themselves from the market. In some markets, only the most risk-prone companies will remain. This trend will have a dramatic adverse impact on the price and quality of the goods the Government seeks to purchase.

C. Judicial review of default terminations will be compromised if the FAR's default termination procedures are not deemed mandatory.

The APA provides for judicial review of agency actions such as terminations for default. Boards of contract appeals and the federal courts play a crucial role in maintaining the credibility of the government as a contracting partner -- to ensure that terminations for default are made in accordance with proper procedure, and particularly that the discretion to terminate has been reasonably exercised.

Here, the Federal Circuit has held that although the factors enumerated in FAR §49.402-3(f) "may aid a Board of Contract Appeals or a court in determining whether a contracting officer has abused his discretion," they "are not prerequisites to a valid termination." 79 F.3d at 135 (App. 8a)(citations omitted). The Federal Circuit adopted the view expressed in several ASBCA opinions that the failure to consider one of the seven factors does not require conversion of a termination for default into a termination for the convenience of the government. *Id.* Under this interpretation, as leading government contracts scholars have cautioned, "[t]here is doubt as to what evidence is necessary to establish discretion or lack thereof." JOHN CIBINIC, JR. AND RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 982 (3d ed. 1995). This doubt undermines the credibility of the Government as a contracting partner. Noted administrative law scholars Davis and Pierce, without explanation, go so far as to state that an agency's failure to follow its own published procedural regulations can give rise to serious due process concerns, which further undermine the Government's credibility as a contracting partner. KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., II ADMINISTRATIVE LAW TREATISE §9.1 at 2 (3d ed. 1994).

Not every improper determination will be as blatant as those in *Darwin, Schlesinger,* or the much publicized Navy A-12 case, *McDonnell Douglas Corp. and General Dynamics Corp.* v. *United States*, 1996 U.S. Claims LEXIS 57 (No. 91-1204C)(April 8, 1996), where it was readily apparent that the Government was trying to "rid itself" of the contractor. We will never know what motivated the DGSC to terminate the light set contract with such extraordinary haste on the heels of the termination of the two power supply and distribution contracts. Moreover, neither DCX nor any other similarly situated contractor should have to suffer the extraordinary "well-nigh irrefragable" burden of proof in alleging a bad faith termination -- that the light set contract, or any other contract was terminated so that the Government might "rid itself" of a contractor. *Darwin,* 811 F.2d at 597 (*discussing Kalvar Corp.* v. *United States,* 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied,* 434 U.S. 830 (1977) and *Knotts* v. *United States,* 121 F. Supp. 630, 636 (Ct. Cl. 1954)).

Instead, if the Government is to be considered a reliable contracting partner, DCX, or any other similarly situated contractor, should be able to seek relief before the boards of contract appeals or the federal courts requesting that they convert such default terminations to terminations for the convenience of the government by engaging in meaningful review of the agency's compliance with each of the FAR's termination criterion. *See, e.g., Darwin,* 811 F.2d at 598-99 (bad faith default termination converted to termination for convenience because the termination contracting officer failed to consider the regulation's factors). If the criterion are not mandatory, the effect is to grant a termination contracting officer the authority to terminate a contract without the reasoned exercise of discretion and to deprive the boards of contract appeals and the federal courts of meaningful review of the termination contracting officer's decision.

CONCLUSION

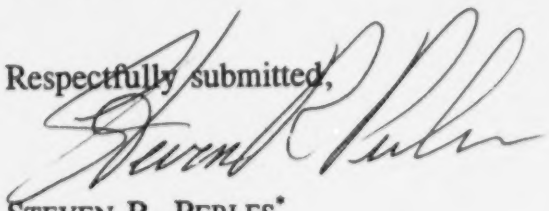
Whether government contracting officers are bound by the procedures enumerated in the FAR is a recurring question for boards of contract appeals and the federal courts. When the Federal Circuit initially addressed this question, it concluded that the procedural requirements of the FAR required substantive consideration by termination contracting officers. *See Fairfield*, 611 F.2d 854; *Darwin*, 811 F.2d 593. The holdings in these cases ensured that termination contracting officers exercised reasoned discretion when terminating contracts for default.

More recently, however, according to the Federal Circuit, there followed opinions by the boards of contract appeals which retreated from the teachings enunciated by *Fairfield* and *Darwin*. *See, e.g., Appeal of William A. Hulett,* 93-1 BCA (CCH) ¶25,389 at 126,459 (1992); *Appeal of National Medical Staffing, Inc.,* 92-2 BCA (CCH) ¶24,837 at 123,918-19 (1992); *Appeal of Metroplex Indus. Constructors, Inc.,* 89-3 BCA (CCH) ¶22,174 at 111,574 (1989); *Appeal of Lafayette Coal Co.,* 89-3 BCA (CCH) ¶21,963 at 110,482 (1989); *Appeal of Douglas County Aviation, Inc.,* 85-3 BCA (CCH) ¶18,257 at 91,655 (1985); *Appeal of Spectrum Leasing Corp.,* 85-1 BCA (CCH) ¶17,822 at 89,199 (1984); *Appeal of International Elecs. Corp.,* 76-1 BCA (CCH) ¶11,817 at 56,430 (1976). According to the Federal Circuit, these cases support the conclusion that the procedures outlined in the FAR are only guidelines for termination contracting officers and neither bind the Government nor confer rights on the contractor. The Federal Circuit issued an unreported opinion last year consistent with this approach. *DCX* is the Federal Circuit's first reported opinion advancing this theory. None of these opinions addressed the questions raised upon examination of the FAR's relationship to the APA.

This judicial trend is alarming. All government contracts may be affected by the broader question of whether the FAR's procedural requirements are subject to the APA. The APA is the basic mechanism through which control of agency action is assured; without it, agencies would enjoy unbridled discretion. If the default termination procedures are not subject to the APA, and are therefore not prerequisites to a valid termination, then the APA's protection in the context of government contracting is illusory, and the Government's reliability as a contracting partner will be significantly diminished.

For the foregoing reasons, it is incumbent upon this Court to issue a writ of certiorari and reverse the decision of the Court of Appeals for the Federal Circuit.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on May 24, 1996.

FOR THE COURT,
FRANCIS X. GINDHART,
CLERK

Dated: May 16, 1996

By {Signature}
Brian P. LeDuc
Associate Chief Deputy Clerk

cc: STEVEN R. PERLES
FRANCES M. TOOLE

DCX V DEFENSE, 94-1385
(BCA - 37671)

{File Stamp}
FILED
U.S. COURT OF
APPEALS FOR THE
FEDERAL CIRCUIT
MAY 16, 1996
FRANCIS X.
GINDHART
CLERK

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*
* Note: Pursuant to Fed. Cir. R. 47.6, *
* this order is not citable as precedent. *
* It is a public record. *
*
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APPENDIX B

United States Court of Appeals for the Federal Circuit

94-1385

DCX, INC.,

Appellant,

v.

William J. Perry
SECRETARY OF DEFENSE,

Appellee.

DECIDED: March 11, 1996

Before MAYER, MICHEL, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

DCX, Inc., appeals a decision of the Armed Services Board of Contract Appeals upholding the government's termination of a contract for default. We affirm.

I

On April 1, 1988, the Defense Logistics Agency awarded a contract to DCX for light sets to be used in medical tents. The contract required DCX to perform a series of tests on the first light set that DCX manufactured under the contract and to supply the government with a First Article Test Report. The test report was due on June 30, 1988, and delivery of the light sets was required to begin by July 18, 1988. The contract provided that if DCX failed to deliver the test report on time, it "shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract."

Because it did not have the facilities to perform the first article tests, DCX subcontracted the testing to Ball Brothers Aerospace Systems. Under the subcontract, the tests were to begin on May 19. Ball, however, did not begin DCX's tests until June 17. On that date, DCX advised the government that the testing process would not be completed until July 11 and that the government therefore would not receive the First Article Test Report until July 12. DCX blamed Ball's delay on the government's Defense Priorities and Allocations System (DPAS), which it asserted required Ball to postpone the DCX tests in favor of higher priority government contracts. On July 1, the day after the test report was due under the contract, the contracting officer advised DCX that it was in default, but she agreed to forbear termination until July 12, thus effectively granting DCX the additional time requested in its June 17 letter. When DCX failed to deliver the test report on the extended due date, however, the contracting officer referred the contract to the termination contracting officer who terminated the contract for default.

DCX appealed to the Armed Services Board of

Contract Appeals, alleging that its failure to deliver the First Article Test Report was excusable because it was caused by the operation of the DPAS, and that the termination contracting officer had acted arbitrarily and capriciously in terminating the contract. DCX asked that the termination for default be converted into a termination for the convenience of the government.

The Board upheld the termination for default, finding that the delay was the fault of DCX and its subcontractor, Ball. The Board focused in particular on DCX's failure to guarantee timely performance by obtaining either a backup subcontractor or a binding time commitment from Ball to complete the tests by a date certain. With respect to DCX's proffered excuse for its failure to produce the test report by the extended deadline, the Board concluded that there was insufficient evidence that the operation of the DPAS caused the delay. The Board further found that the termination contracting officer adhered to the contract terms and the applicable procurement regulations, and that his termination decision was thus not arbitrary or capricious.

II

On appeal, DCX makes three arguments: that the operation of the DPAS, not the negligence of DCX or its subcontractor, caused the delay in the delivery of the First Article Test Report; that the contracting officer abused his discretion when he terminated the contract for default; and that the Board's decision was tainted by fraud committed by the government's attorneys.

A

The Board found that the government met its burden of proving that DCX did not perform in a timely fashion, and that DCX failed to meet its burden of proving that its nonperformance was excusable. See Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 764 (Fed Cir. 1987); Switlik Parachute Co. v. United States, 573 F.2d 1228, 1234 (Ct. Cl. 1978). DCX contends that the evidence conclusively showed that its failure to submit the First Article Test Report in a timely fashion was not attributable to any fault of DCX or Ball, but was caused by the government through the operation of the DPAS regulations, which require contractors to give precedence to higher priority government contracts. After reviewing the record, we agree with the Board that DCX failed to meet its burden of showing that the DPAS regulations excused its failure to fulfill the testing requirements of the contract.

The default clause in the contract excused any default caused by certain enumerated actions, including "acts of the Government." The default clause added, however, that "the failure to perform must be beyond the control and without the fault or negligence of the Contractor" or (in the case of a subcontract) "beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either." Although the operation of the DPAS may give rise to excusable delay in an appropriate case, the DPAS regulations require performance of a lower priority contract to be deferred only if "required delivery dates [for the higher rated contract] cannot otherwise be met." 15 C.F.R. § 700.14(a). As the Board pointed out, DCX's witness, who admitted having only limited acquaintance with the government contract priority system, testified that Ball deferred DCX's tests in favor of

higher priority government contracts, but he did not testify that the displacement of DCX's tests was necessary in order to meet the required delivery dates of the higher priority contracts.

Moreover, as the Board noted, DCX did not take steps to protect against the possibility of delay in the testing process. DCX did not obtain its subcontract with Ball until May 11, 1988, some six weeks after the award of the contract to DCX, and the subcontract with Ball contained no firm commitment as to the date on which the testing would be completed. In addition, the Board pointed out, DCX "had no backup arrangements or commitments from any other party, that were available, to perform the tests needed in the event Ball delayed or for any reason was unable to meet DCX's time of delivery requirements." The Board was thus warranted in finding that DCX's failure to perform was attributable to its own negligence and that of its subcontractor, rather than to the operation of the DPAS.

B

DCX next argues that the termination contracting officer acted arbitrarily and capriciously in terminating the DCX contract for default because he failed to follow certain provisions of the Federal Acquisition Regulation before he terminated the contract. The Board found that the termination contracting officer adhered to both the terms of the contract and the requirements of the applicable procedural regulations. Once again, we uphold the Board's findings as supported by the evidence before it.

The first regulatory provision that DCX complains was not followed is 48 C.F.R. § 49.402-3(a), which requires the

contract. The termination contracting officer testified that he obtained the required legal review before terminating the contract, although he was not able to state with certainty which attorney reviewed the proposed termination action. DCX argues that the termination contracting officer's testimony was incredible, but that contention is baseless. The witness was firm in asserting that a legal review was conducted, and in light of the large number of contracts he handled over a several-year period, it is hardly surprising that he could not recall all the details of the legal review.

The second regulatory provision on which DCX relies, 48 C.F.R. § 49.402-3(f), requires a contracting officer to consider various factors before exercising his discretion to terminate a contract when the contractor is in default. In this case, the termination contracting officer's contemporaneous memorandum and hearing testimony demonstrate that he addressed the pertinent regulatory factors and found that they did not counsel against termination under the circumstances of this case. Moreover, the factors in section 49.402-3(f) that contracting officers are directed to consider before terminating contracts are not prerequisites to a valid termination. Although compliance or noncompliance with section 49.402-3(f) may aid a Board of Contract Appeals or a court in determining whether a contracting officer has abused his discretion in terminating a contract for default, see Darwin Constr. Co. v. United States, 811 F.2d 593, 598 (Fed. Cir. 1987); Fairfield Scientific Corp. v. United States, 611 F.2d 854, 862 (Ct. Cl. 1979), the regulation does not confer rights on a defaulting contractor. A contracting officer's failure to consider one or more of the section 49.402-3(f) factors therefore does not require that a default termination be converted into a termination for the convenience of the government. The Boards of Contract Appeals have embraced

that view in a number of cases, and we agree. See, e.g., William A. Hulett, 93-1 B.C.A. (CCH) ¶ 25,389, at 126,459 (1992); National Medical Staffing, Inc., 92-2 B.C.A. (CCH) ¶ 24,837, at 123,918-19 (1992); Metroplex Indus. Constructors, Inc., 89-3 B.C.A. (CCH) ¶ 22,174, at 111,574 (1989); Lafayette Coal Co., 89-3 B.C.A. (CCH) ¶ 21,963, at 110,482 (1989); Douglas County Aviation, Inc., 85-3 B.C.A. (CCH) ¶ 18,257, at 91,655 (1985); Spectrum Leasing Corp., 85-1 B.C.A. (CCH) ¶ 17,822, at 89,199 (1984); International Elecs. Corp., 76-1 B.C.A. (CCH) ¶ 11,817, at 56,430 (1976).

DCX argues that the termination contracting officer acted rashly by terminating the contract on July 13 without considering the reasons for the delay. As the officer testified, however, the government had already given DCX an extension of time within which to produce the First Article Test Report. The contracting officer agreed to forbear termination until July 12, as requested by DCX. When July 13 arrived, the contracting officer had not received either the report or a request for a further extension of time. Having been given no explanation for the further delay, the termination contracting officer was not required to assume that DCX had a valid excuse for the further delay or to seek out further information about the status of the DCX's efforts. We therefore find nothing in the record to persuade us that the termination contracting officer acted arbitrarily or capriciously in terminating the contract when he did.

C

DCX's final argument is that the attorneys for the government who presented this case to the Board committed fraud on the Board and that the Board's decision should be overturned on that ground. The allegations are of the most

serious sort, charging the government attorneys with "submitting tampered evidence" and "collaborating with their witness to present false testimony." Yet the charges, which occupy a substantial portion of DCX's brief on appeal, were raised only obliquely before the Board. Although it is questionable whether DCX's passing reference to the challenged conduct in the brief it submitted to the Board was sufficient to preserve the fraud issue for our review, we have nonetheless examined the charges in light of the seriousness of the allegations.

Upon examination, we find the charges of fraud to be unsubstantiated. The charges are based primarily on a discrepancy between two copies of the memorandum prepared by the termination contracting officer on the day of the termination. The memorandum contains a signature line for the termination contracting officer and a signature line for the reviewing attorney. On the copy of the memorandum in the exhibit file, the termination contracting officer's signature is present, but the attorney's signature line is blank. On another copy of the memorandum located by appellant's counsel, however, both signature lines are completed. Appellant's counsel infer from the discrepancy between the two copies of the memorandum that the attorney's signature was "redacted" from the unsigned copy of the document in the exhibit file as part of a "scheme" to deceive the Board.

The need for deceit, according to DCX, arose from the fact that the attorney who signed the memorandum was out of town on the day of the termination and thus could not have signed the termination memorandum before the termination was effected. The evidence at the hearing, however, shows that there was no reason for the government attorneys to tamper with the evidence or otherwise seek to deceive the

Board. The termination contracting officer did not testify that the attorney signed the memorandum before the termination, nor was there any legal requirement that he do so. In fact, the termination contracting officer testified that he believed that it was another attorney -- not the one who signed the memorandum -- who conducted the pre-termination legal review. Moreover, the termination contracting officer testified that he retained a "dummy file" of his terminations, which suggests the entirely plausible (and innocent) explanation that the absent attorney at some later point signed one copy of the termination memorandum but not the other. The attorney who signed the memorandum was present at the hearing; counsel for appellant could have pursued the matter by questioning him, but chose not to do so. The "unsigned document" evidence thus provides no support for appellant's charge of fraud.

The other evidence that counsel point to in support of the fraud charge is a line of testimony by the termination contracting officer that appellant's counsel characterize as "evasive." While the witness was unable to recall certain details about the day that he terminated the DCX contract, we do not agree with appellant's characterization of the testimony as "evasive." Nor have we found anything in the testimony or other evidence at the hearing to support the charge that the witness committed perjury and that the government lawyers were aware of the perjury but failed to call it to the Board's attention. The charges of fraud therefore provide no basis for upsetting the Board's decision; indeed, we regard it as irresponsible for counsel to make such accusations while lacking a substantial basis to support them.

AFFIRMED.

APPENDIX C

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)
	)
DCX, Inc.	) ASBCA No. 37671
	)
	)
Under Contract	)
No. DLA0400-88-C-5241	)

APPEARANCE(S) FOR THE APPELLANT:

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Steven R. Perles, Esq.
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APPEARANCE(S) FOR THE GOVERNMENT:

Donald S. Tracy, Esq.
Chief Trial Attorney
Defense General Supply
Center (DLA)
Richmond, VA

OPINION BY ADMINISTRATIVE JUDGE HARPER
ON MOTION FOR RECONSIDERATION

Appellant, DCX, Inc. has filed a motion for reconsideration of our opinion of 31 January 1994, wherein we denied its appeal (94-1 BCA _____).

We have carefully reviewed the motion. We find that appellant offers no new evidence or argument that was not fully previously considered in arriving at our decision. Appellant disagrees with some of our findings of fact and the conclusions drawn therefrom. Appellant gives greater weight to parts of the evidence than does the Board.

After carefully reviewing appellant's motion, the record, and our decision we are persuaded that the decision was not in error. Accordingly, we reaffirm our decision.

Dated: 19 April 1994

{Signature}
HERBERT C. HARPER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

{Signature}
V. JOHN RIISMANDEL
Administrative Judge
Acting Chairman,
Armed Services
Board of Contract Appeals

I concur

{Signature}
WILLIAM J. RUBERRY
Administrative Judge
Vice Chairman,
Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 37671, Appeal of DCX, Inc., rendered in conformance with the Board's Charter.

Dated: 19 APR 1994

{Signature}
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX D

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)
	)
DCX, Inc.	) ASBCA No. 37671
	)
Under Contract	)
No. DLA400-88-C-5241	)

APPEARANCE(S) FOR THE APPELLANT:

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OPINION BY ADMINISTRATIVE JUDGE HARPER

DCX, a Colorado corporation with its principal office in Franktown, Colorado (hereinafter "DCX"), appeals, pursuant to the Contract Disputes Act of 1978, from a final decision of a contracting officer of the Defense Logistics Agency (hereinafter "Government") which

terminated a contract for the supply of electric fluorescent light assemblies for use in extendable personnel tents which DCX failed to deliver on time.

FINDINGS OF FACT

1. On 21 July 1987 Government solicited offers, under Solicitation No. DLA400-87-R-5894, for furnishing 12,002 General Illumination Light Sets for use in modular extendable personnel tents. The solicitation indicated that any contract awarded as a result of the solicitation would include the Termination for Convenience of the Government (Fixed Price), FAR 52.249-2 (APR 84), clause and the Default (Fixed-Price Supply and Service), FAR 52.249-8 (APR 84), clause. In addition the Priority Rating clause, FAR 52.212-9000, was included in the solicitation, which stated as follows:

> Any contract awarded under this solicitation will be assigned a priority rating (DO or DX as applicable) and will include a certification for National Defense use under regulations issued by the Department of Commerce in implementation of the Defense Production Act of 1950, as amended. Contractors are required to utilize said rating in obtaining the products, materials and supplies needed to fill their contracts. In the event the contractor is unable to obtain the necessary products, materials and supplies to complete the contract, the contractor shall immediately advise the Defense Contract Administration Services Region (DCASR) or the appropriate Defense Supply Center (DSC)

> DMS officer through the cognizant administrative contracting office or contracting officer. The DMS officer or the DCASR industrial specialist will provide necessary assistance or will provide the necessary instructions to complete the form ITA-999, Request for Special Priorities Assistance. The Form ITA-999 will be processed through appropriate channels to the Department of Commerce which upon receipt will take action to make the needed supplies available to the applicant.

(R4, tab 1a)

2. The solicitation also contained a requirement for First Article Testing and the furnishing to Government of a First Article Test Report (FATR) as follows:

> (A) The contractor shall test 1st unit(s) of Lot/Item 6230-01-242-2016 as specified in this contract. At least 30 calendar days before the beginning of First Article tests, the contractor shall notify the contracting officer, in writing, of the time and location of the testing so that the Government may witness the tests.
>
> (B) The contractor shall submit the First Article Test Report within 30 calendar days from the date of this contract to [DGSC] contracting officer (C.O.) with information copy to the administration [sic] contracting officer (ACO) marked First Article Test Report Contract No._____ Lot/Item No. _____ within 30 calendar days after the Government

receives the test report [sic]. The contracting officer shall notify the contractor, in writing, of the conditional approval, approval, or disapproval of the First Article. The notice of conditional approval or approval shall not relieve the contractor from complying with all requirements of the specification and all other terms and conditions of this contract. A notice of conditional approval shall state any further action required of the contractor. A notice of disapproval shall cite reasons for the disapproval.

(C) If the First Article is disapproved, the contractor, upon Government request, shall repeat any or all First Article tests. After each request for additional tests, the contractor shall make any necessary changes, modifications, or repairs to the First Article or select another First Article for testing. All costs related to these tests are to be borne by the contractor, including any and all costs for additional tests following disapproval. The contractor shall then conduct the tests and deliver another report to the Government under the terms and conditions and within the time specified by the Government. The Government shall take action on this report within the time specified in Paragraph (B) above. The Government reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule, or for any additional costs to the Government related to these tests.

(D) If the contractor fails to deliver any First Article report on time, or the contracting officer disapproves any First Article, the contractor shall be

deemed to have failed to make delivery within the meaning of the Default clause of this contract.

(E) Unless otherwise provided in the contract, and if the approved First Article is not consumed or destroyed in testing, the contractor may deliver the approved First Article as part of the contract quantity if it meets all contract requirements for acceptance.

(F) If the Government does not act within the time specified in Paragraph (B) or (C) above, the contracting officer shall, upon timely written request from the contractor, equitably adjust under the Changes clause of this contract the delivery or performance dates and/or the contract price, and any other contractual terms affected by the delay.

(G) Before First Article approval, the acquisition of materials or components for, or the commencement of production of, the balance of the contract quantity is at the sole risk of the contractor. Before First Article approval, the costs thereof shall not be allocable to this contract for (1) progress payments, or (2) termination settlements if the contract is terminated for the convenience of the Government.

(H) The contractor shall produce both the First Article and the production quantity at the same facility and shall submit a certification to this effect with each First Article.

(R4, tab 1a, emphasis added)

3. At the time DCX considered making an offer in response to the solicitation it lacked the equipment and facilities to conduct some of the tests required as a part of the First Article testing sought by the solicitation. Nevertheless, DCX submitted an offer to Government dated 20 January 1988 in which it offered to supply the 12,002 light sets for a price of $4,992,620. On 26 February 1988, DCX offered to reduce the price to $4,374,964.55 for the light sets and to perform the First Article testing and to supply the FATR for a separate and additional price of $24,233 (R4, tabs 1a, 1b).

4. There was no evidence provided by DCX that, at the time it made its offers, it had obtained all the facilities and equipment needed to perform all parts of the required First Article testing, or that it had obtained a firm and binding commitment from anyone else to provide such facilities and equipment or to perform those portions of the First Article testing that DCX knew it was incapable of providing within the time limits demanded by the solicitation (R4, tabs 1, 1a).

5. On 1 April 1988 Government awarded a contract, numbered DLA400-88-C-5241, to DCX for furnishing the light sets, the First Article testing, and the FATR. The contract called for delivery of the FATR by 30 June 1988 and the light sets to be delivered in increments commencing 18 July 1988 and completing 4 November 1988. The contract indicated that it was a rated order certified for National Defense use, that DCX was required to follow all provisions of the Defense Priorities and Allocations Systems Regulation (15 CFR 350), and that the contract was rated as having a DO-C9 priority. (R4, tabs 1, 1a)

6. On 19 April 1988 Ball Brothers Aerospace Systems of Boulder, Colorado (hereinafter "Ball") made a quotation to DCX concerning performing testing on light sets plus furnishing a test report. On 11 May 1988 DCX issued a Purchase Order numbered 8003-31 to Ball for the furnishing of tests to be performed on a Light and Case Assembly in accordance with MIL-L-44259A for a price of $13,889. The Purchase Order stated:

> Testing will begin May 19, 1988. Delivery of tested item will be determined by completion of all applicable tests.

The Purchase Order also stated as follows:

> This is a rated order certified for national defense use, and you are required to follow all provisions of the Defense Priorities and Allocations Systems Regulation (15 CFR 350).
>
> * * *
>
> DELIVERY: Time is of the essence in this order.

(Exh. G1)

7. From the time that Government's solicitation was issued on 21 July 1987 until the time DCX issued its Purchase Order to Ball on 11 May 1988 Ball had been under various prior contracts with the Department of Defense and other customers which required testing. Such required testing involved the same facilities and equipment that were needed to test the light sets for DCX. Most of such preexisting contracts had priorities established by the

Defense Priorities and Allocations Systems Regulation. Ball established by itself the priorities as to which of its contracts would be performed first and the sequence of performance of other contracts thereafter. (Tr. 138, 140-42, 142, 160-61, 162)

8. On 19 April 1988 DCX wrote to Government as follows:

> This is your formal notification of First Article Approval Tests. Testing will begin on May 19, 1988 and continue through July 15, 1988. The tests will be conducted alternately at Ball Brothers Aerospace Systems and DCX, with the first tests to start at Ball Brothers Aerospace Systems in Boulder on May 19.

(R4, tab 6)

9. On 2 May 1988 DCX wrote to Government, in pertinent part, as follows:

> [T]he First Article testing is scheduled to begin on May 18, 1988. Our testing laboratory has informed us that if we miss our scheduled date, there could be as long thirty (30) days delay and at minimum a twelve (12) day delay.

(R4, tab 7)

10. Ball was not the sole source available for the testing needed by DCX (tr. 29, 88, 145, 163). When Ball entered its subcontract with DCX to perform testing Ball knew that it was obligating itself to start the testing on 19 May 1988 (tr. 145, 178).

11. On 18 May 1988 DCX wrote to Government proposing changes in the design and components of the light sets. DCX indicated that the First Article Testing would begin on 18 May 1988 and that DCX was expediting completion "as much as possible." (R4, tab 8)

12. On 19 May 1988 Ball elected not to start testing the DCX First Article. Ball chose to utilize the facilities, equipment and personnel needed to test DCX's First Article for the testing of Ball's own products and the products of other customers of Ball. Such Ball products were the result of prior contracts and had priority ratings. Ball's decision to test its own products and the products of others prior to DCX's testing was made solely by Ball without any consultation with Government. (Tr. 147, 162) Ball notified DCX of its decision to delay the testing (tr. 149).

13. On 20 May 1988 Government visited DCX's manufacturing facilities to see what progress DCX was making towards performing the contract. DCX advised Government that the First Article Testing was proceeding "as scheduled." Government observed that DCX had included design changes and a change of components it had proposed to Government in its letter dated 18 May 1988 (finding 11) even though Government had not approved or authorized such changes. DCX made one First Article with such changes and one without and apparently tested both. Government decided that DCX's actions might be endangering performance of the contract as required by the delivery schedule. (R4, tabs 9, 10)

14. In spite of Ball's delay in testing the First Article DCX continued to press for acceptance of its proposed changes in design and components of the light sets

and did not advise Government of Ball's delay (R4, tabs 13, 14a, 14b). In a letter to Government on 2 June 1988 DCX sought approval of its proposed changes and advised that "[a]ll critical tests will have been complete by June 16, 1988" (R4, tab 15).

15. On 7 June 1988 DCX wrote to Government advising that six of the First Article Tests had been completed, that two additional tests would be completed by 9 June 1988 and that all testing would be completed by "6/30/88". No mention was made of the Ball delay in starting its portion of the testing. (R4, tab 17)

16. On or about 10 June 1988 the contracting officer wrote to DCX as follows:

> Reference is made to Contract DLA400-88-C-5241, NSN 6230-01-242-2016 and DCX's letter dated 07 June 1988.
>
> The contract requires line item 9907 First Article Test Report (FATR), to be delivered to the Contracting Officer at DGSC on or before 30 June 1988.
>
> Your 07 June 1988 letter indicates testing will be completed on 30 June 1988. Therefore, the FATR cannot be delivered timely and you are hereby notified that the Government considers this to be a condition that is endangering performance on this contract.
>
> Therefore, unless this condition is cured within 10 days after receipt of this notice, the Government may

> terminate for default under the terms and conditions of the Default clause, FAR 52.249.8 as contained in this contract.
>
> Further, your ECP's submitted under this contract have been forwarded to the Engineering Support Agency for review. However, you are required to continue production in accordance with the existing terms and conditions since there can be no delay in the delivery of material required on this contract.

(R4, tab 19a)

17. DCX responded to the contracting officer's letter of 10 June (which was erroneously dated 22 May 1988) as follows on 14 June 1988:

> We are in receipt of your letter dated 22 May 1988. We intend to deliver material requested by this contract in a timely fashion.
>
> Section No. I, 52.209-3, (G) of our contract requires that we receive written authorization from you before proceeding to procure material. Do the words in your letter dated 22 May 1988, "you are required to continue production in accordance with the existing terms and conditions since there can be no delay in the delivery of material required on this contract," constitute such authorization? We have assumed it is and are proceeding however, in order to avoid any misunderstanding, we would like you to confirm this in writing.

> As stated in your letter, our letter of 7 June 1988 indicated testing to be complete by 30 June 1988. Through no fault of our own, this schedule has now slipped to 7 July 1988 due to our material being "Bumped" from the test chamber by higher priority Government contracts at our test facility, Ball Brothers, Inc., in Boulder, Colorado. In as much as this change will not affect the delivery schedule for the contracted items, DCX still considers it is in substantial compliance with the contract. Please confirm your acceptance of this new date in writing.
>
> Your immediate attention to this matter is respectfully requested.
>
> Thank you for your continued cooperation.

(R4, tab 19b)

18. Ball's testing of the DCX First Article did not start until 17 June 1988 (Supp. R4, tabs 5, 6; exh. A5). On 17 June 1988 DCX advised Government that all testing of the First Article would be completed by 11 July 1988 and that the FATR would be received by Government on 12 July 1988. DCX told Government that Ball's delay in starting its testing was caused by a contract Ball had with the Air Force which had to be tested ahead of the DCX testing and because of other contracts all of which had higher priorities than the DCX contract (R4, tab 23; Supp. R4, tab 7). At the hearing of this appeal DCX provided no substantiation or verification of such allegations. Likewise, at the hearing of this appeal neither DCX nor Ball provided any evidence of specific contracts between Ball and Government that required testing and use of Ball's facilities and personnel

ahead of testing the DCX First Article. Ball's only evidence consisted of unsupported allegations that there were other contracts with Government that were performed by Ball ahead of DCX's contract and that the decisions of priority were made by higher authorities in the Ball organization. Such higher authorities did not testify. (Tr. 151-55, 157-60) Nor is there any evidence that DCX requested priority assistance from Government. Ball admitted that it sets its own priorities as to what is tested and when such testing is performed (tr. 162).

19. On 1 July 1988 the contracting officer wrote to DCX, in pertinent part, as follows:

> Contract DLA400-88-C-5241 required the first article test report to be delivered to the Government by 30 June 1988. You have failed to deliver the report and are in default. However, based on the information in reference a [DCX's 17 June 1988 letter], I will forbear terminating this contract until 12 July 1988.
>
> Your request to substitute a 5 amp circuit breaker for the MS switch is denied. I want to remind you that you are obligated to test and deliver items in strict accordance with the specification and the item description contained in the contract. Further, until you deliver a first article test report and it is formally approved in writing, you are not authorized to begin production. If you choose to do so in order to insure that you will meet the final contract delivery dates, you do so at your own risk. I also want to make it clear that any work performed to produce any item not in strict accordance with the specifications and item description is solely at your

option and risk.

> Finally, I want to stress the importance of the contract delivery dates. It is absolutely essential that the items be delivered within the time frames specified in the contract. These items are required to support the DEPMEDS [Deployable Medical Assistance] program and any delay in your delivery would have serious consequences for this program.

(R4, tab 26)

20. On 4 July 1988, during the testing by Ball of the DCX First Article in a humidity chamber, the test unit was erroneously turned off by Ball. The unit was not restarted until 5 July 1988. The testing had to be extended an additional day as a result (Supp. R4, tab 10).

21. Government did not receive DCX's FATR on 12 July 1988 because Ball's testing was not completed until 14 July 1988. The test report was not ready for shipment to Government until 15 July 1988 and could not be received by Government per the contract terms at Richmond, Virginia, until 16 July 1988. (Supp. R4, tab 11; tr. 32, 46, 48, 63-64, 179; exh. A5)

22. The Default (Fixed Price Supply and Service) clause, (APR 1984), FAR 52.249-8, of the contract, in pertinent part, provided as follows:

> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the contractor fails to -

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

* * *

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (l) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault

> or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(R4, tab 1)

23. On 13 July 1988 Government, in accordance with the contract terms and after considering the factors in FAR 49-402.3(f), terminated the contract in whole for failure to deliver the FATR in accordance with the contract delivery schedule as extended (R4, tab 34; tr. 26-32, 45, 46, 48, 50-51, 61, 63-64, 88, 94, 106). Written notification was telegraphed to DCX on 13 July 1988 and received by DCX on 14 July 1988 (R4, tabs 18, 34, 35; Supp. R4, tabs 13, 14).

CONTENTIONS OF THE PARTIES

DCX does not dispute that the FATR was not timely furnished to Government. DCX argues that the failure to deliver the report was excusable; that the failure to deliver was caused by implementation of the Defense Priorities and Allocations Systems Regulation; that the failure to deliver was without the fault or negligence of DCX or Ball, and that Government's actions in terminating the contract were arbitrary and capricious and not in accordance with the terms of the contract and applicable law and regulations. DCX contends that the termination should be converted to a termination for the convenience of the Government.

Government argues that DCX failed to prove that

nondelivery of the report was excused by Government's priority requirements and further failed to prove that the failure to make a timely delivery was without its fault or negligence or the fault or negligence of its subcontractor.

DECISION

We find no merit in DCX's arguments that its failure to make a timely delivery of the FATR was excused.

When DCX made its offer to Government it knew that it lacked the equipment and facilities necessary to perform all the First Article tests required. Moreover, it made its offer knowing that it lacked any binding commitment from anyone to provide such equipment and facilities. Accordingly, it assumed the risk that it might not be able to perform or complete all the required tests within the specified time limits.

DCX waited until 11 May 1988 to enter into a subcontract with Ball to provide the missing equipment and facilities. Such subcontract called for the missing equipment and facilities to be furnished commencing on 19 May 1988. However, the subcontract failed to require that the tests were to be performed by Ball within time limits sufficient for DCX to complete its FATR and to deliver the same to Government by the required date of 30 June 1988. Again, DCX assumed the risk that if all applicable tests were not timely completed DCX would be unable to meet DCX's promised delivery date to Government of the FATR. Moreover, DCX had no backup arrangements or commitments from any other party, that were available, to perform the tests needed in the event Ball delayed or for any reason was unable to meet DCX's time of delivery

requirements under DCX's contract with Government. Such actions and inactions by DCX do not excuse its failure to make timely delivery. DCX's failure to properly and timely obtain firm sources of timely supply for its testing requirements was its own fault. See Northern Virginia Electric Co., Inc., ASBCA No. 21446, 80-1 BCA ¶ 14,239; aff'd. 230 Ct. Cl. 722 (1982).

We do not accept DCX's argument that its failure to deliver was caused by implementation of Defense Priorities and Allocations Systems Regulation. There was insufficient evidence by DCX to prove that Ball's actions in delaying starting its testing of the First Article was caused by Governmental action. Ball may have had other independent contracts with Government which may have had a higher priority rating than the contract between Government and DCX. However, no such contract was offered into evidence to show that it required Ball to delay its testing of DCX's First Article in favor of such other contract or that DCX required priority assistance from Government. Moreover, no proof was made showing that Ball was required by Government to disregard its promise to DCX to start testing on 19 May 1988. The only evidence presented was that Ball's management made a decision to delay use of its equipment and facilities for testing DCX's First Article to a date later than 19 May 1988. Furthermore, the evidence showed that Ball negligently turned off its test equipment needed to test the First Article and left such equipment turned off for a whole day. This error in itself was enough to cause DCX to miss DCX's extended delivery date for the FAR. Such actions by Ball are inexcusable. The law is well established that DCX, as the prime contractor, is responsible for the performance of its subcontractor.

Lastly, we are not persuaded by the evidence that Government's termination of the contract for default in performance was improperly carried out or the result of arbitrary and capricious behavior on the part of the contracting officer. The contracting officer adhered to the contracts specific terms covering nondelivery of the FATR as well as the applicable Federal procurement regulations. Such is not arbitrary or capricious.

The appeal is denied.

Dated: 31 January 1994

{Signature}
HERBERT C. HARPER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

{signature}
V. JOHN RIISMANDEL
Administrative Judge
Acting Chairman,
Armed Services
Board of Contract Appeals

I concur

{Signature}
WILLIAM J. RUBERRY
Administrative Judge
Vice Chairman,
Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 37671, Appeal of DCX, Inc., rendered in conformance with the Board's Charter.

Dated: 1 Feb 1994

{Signature}
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

APPENDIX E

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of —	)
	)
DCX, Inc.	) ASBCA Nos. 37669
	) and 37670
Under Contract	)
Nos. DLA400-88-C-5040	)
DLA400-88-C-5081	)

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OPINION BY ADMINISTRATIVE JUDGE HARPER

Appellant, DCX, Inc., a Colorado corporation with its principal office located in Franktown, Colorado (hereinafter "DCX"), appeals pursuant to the Contract Disputes Act of 1978, from two final decisions of a contracting officer of the Defense Logistics Agency

(hereinafter "Government"), which terminated two contracts for the supply of electrical distribution outlet assemblies for use in extendable personnel tents. Contract DLA400-88-C-5081, (ASBCA No. 37669) covered a 120 volt electrical distribution outlet box assembly and cable assembly. Contract DLA400-88-C-5040 (ASBCA No. 37670) covered a similar three phase, 208 volt, electrical distribution outlet box assembly.

FINDINGS OF FACT

1. On 25 June 1987 Government issued a Solicitation for Bids numbered 400-87-R-5837 seeking bids for the supply of three phase, 208 volt, electrical distribution box assemblies. Closing of the bidding was set for 27 July 1987. Delivery of the assemblies was to be on or before 10 February 1988. (R4 (37670), tabs 1, 1a)

2. On 7 July 1987 Government issued a Solicitation for Bids numbered 400-87-B-6264 seeking bids for the supply of 120 volt electrical distribution box assemblies and cable assemblies. Closing of bids was scheduled for 6 August 1987. (R4 (37669), tabs 1, 1a)

3. The solicitations were each independently amended so that the final closing date for receipt of bids for the three phase, 208 volt, box assemblies was 10 August 1987 and the final closing date for the 120 volt box assemblies and cable assemblies was 1 September 1987 (R4 (37670), tabs 1, 1a; R4 (37669), tabs 1, 1a).

4. The three phase, 208 volt, box assembly and the 120 volt box assemblies and cable assemblies were intended to be components of systems for supplying electricity to

overhead lights and instrument sterilizers in extendable tents used in multiple units as rest and recuperation centers for military medical patients. The three phase, 208 volt, box assembly and the 120 volt box assemblies were almost identical in design. Such designs and the cable assembly design had been prepared several years prior to 1987 a textile engineer in the employ of the United States Army Natick Research and Development Center located in Natick, Massachusetts. (Tr. 1/45-46, 48, 2/9-11, 14) A few samples of the boxes had been produced shortly after the designs were developed (tr. 2/18). Thereafter, a supply contract had been awarded by Government to Bruce Industries to supply a quantity of the items in 1985 (tr. 2/19-20, 3/16-17).

5. During performance of the said prior production contract by Bruce Industries it was learned that Government's design and drawings were defective. To perform such contract Bruce Industries had had to add components to the design and had had to change the boxes with Government's approval (tr. 3/16-17, 18, 19, 29). The electrical distribution box assemblies could not be manufactured following Government's plans and specifications (tr. 2/126-27, 130, 131, 226, 238, 246, 4/12-15, 18, 19, 22, 23-24, 33-34; exh. A13). The cable assemblies also lacked strain relief (tr. 3/19). Although Government was aware of the foregoing it did not change or correct its drawings and specifications for the solicitations and contracts involved in these appeals and did not communicate such information to DCX and other prospective bidders (R4 (37669), tabs 3a, 3b; R4 (37670), tabs 3a, 3b; tr. 1/118, 2/11-14, 57, 63-64, 106, 123, 124).

6. Government solicited 52 prospective bidders for

proposals on the 12 volt distribution box assemblies and cable assemblies and received six offers thereon. It solicited 40 prospective bidders for the three phase, 208 volt distribution box assemblies and obtained nine bids thereon. DCX was the lowest bidder in response to each of the solicitations. The defects in the drawings and specifications were not open and obvious to the bidders and none of the bidders raised any questions about the same before or during the bidding. (R4 (37669), tabs 1, 1a, 1b, 2, 3a, 3b; R4 (37670), tabs 1a, 2, 3a, 3b; tr. 1/45-46, 50, 51-52, 118, 3/30-31)

7. Prior to awarding contracts for obtaining either the three phase, 208 volt, distribution box assemblies or the 120 volt box assemblies and cable assemblies Government decided to conduct a preaward survey of DCX. On 27 August 1987 it requested insofar as DCX's ability to supply the three phase 208 volt, box assemblies was concerned. A team of Government specialists conducted the survey. It was completed on 29 September 1987 with a recommendation that a contract be awarded to DCX since DCX displayed satisfactory technical and production capability. (R4 (37670), tab 1b)

8. On 14 September 1987 Government again sought a preaward survey of DCX insofar as its ability to supply the 120 volt box assemblies and cable assemblies was concerned. The same team of experts again surveyed DCX. During this second survey Government became aware that DCX in preparing its bid had not obtained price and delivery quotes from some of the manufacture of components needed to produce the box assemblies (which components were specified in each of the solicitation's drawings and specifications as available only from sole

sources of supply). The survey completed 20 October 1987, nevertheless, recommended that a contract be awarded to DCX. (R4 (37669), tabs 1c, 3a, 3b)

9. Government's drawings and specifications contained in the solicitations for both the three phase, 208 volt, distribution box assemblies and the 120 volt box and cable assembly indicated that a number of components for the assemblies were items obtainable only from particular specified manufacturers or were sole source items (R4 (37669), tabs 1c, 1d, 3a, 3b; R4 (37670), tabs 1c, 3a, 3b). Both solicitations, however, indicated that alternate components could be offered in accordance with the following contract clause:

> 3.2 Materials and components. Materials and components shall be as specified on the applicable drawings and as specified herein. For components for which the contractor proposes to use an item considered to be equal to the component specified, prior to its use the contractor shall furnish a sample of the component, with supporting data to the contracting officer for subsequent evaluation by the responsible military agency. The supporting data required shall prove the functional equivalence and design compatibility of the item proposed to be used. Prior to manufacture of the first article, the contractor shall submit for the contracting officer's approval, a list identifying each proposed alternate component, together with proof that each listed component complies with requirements specified herein. The contracting officer, at his option, may require a physical sample of the proposed

> substitution. Approval of the submitted listing together with necessary supporting data, authorizes the commencement of the first article or production manufacture, as applicable, and does not relieve the contractor of the responsibility that these components perform in accordance with specified requirements when incorporated into the end product.

(R4 (37669), tab 1a; R4 (37670), tab 3a)

10. On 23 October 1987 Government's contracting officer sent a telegram to DCX accepting DCX's offer to furnish 394 three phase, 208 volt, distribution box assemblies at a cost of $724 each for a total of $285,256. The telegram indicated that the contract was numbered DLA400-88-C-5040 and was effective 22 October 1987. The telegram also stated that DCX was to deliver the items F.O.B. destination on or before 7 April 1988. The original closing date of the solicitation was 27 July 1987 and had been subsequently amended to 10 August 1987 and had been amended thereafter to 3 September 1987. The record is silent as to whether DCX received Government's telegram of acceptance and, if so, the date of such receipt. (R4 (37670), tab 1d) DCX's offer had not been delivered to Government by telegram but had been sent via ordinary mail and initially offered delivery F.O.B. destination on or before 10 February 1988 subject to the following clause, in pertinent part:

> (B) The foregoing delivery requirements are based on the assumption that the Government will make award by 87 Aug 26. Each delivery date in the delivery schedule set forth herein will be extended by the number of calendar days after the above date that

> the contract is in fact awarded. Attention is directed to provision 52.214-10 or 52.215-16, Section L, as applicable to the solicitation provisions, which provides that a written award mailed or otherwise furnished to the successful offeror results in a binding contract. Therefore, in computing the available time for performance, the offeror should take into consideration the time required for Notice of Award to arrive through the ordinary mails.

(R4 (37670), tabs 1a, 1d)

11. Government's contracting officer signed an award of contract numbered DLA400-88-C-5040 on 3 November 1987 to DCX for the supply of 394 three phase, 208 volt, electrical distribution box assemblies. Such award indicated that it was a "Confirming Order" and that its effective date was 22 October 1987. It further indicated that it was mailed from Richmond, Virginia, to DCX in Franktown, Colorado, on 12 November 1987. It stated that delivery was to be "FOB: Destination on or before 7 April 1988." The record is silent as to when and if such Notice of Award was received by DCX. Seventy-eight days elapsed between 26 August 1987 (the prospective date of award upon which the delivery schedule in DCX's bid was predicated and 12 November 1987 the date Government mailed the Notice of Award to DCX. The award failed to provide for Progress Payments despite the fact that DCX's bid had requested that the contract provide for Progress Payments. (R4 (37670), tabs 1, 1a)

12. On 27 October 1987 Government's contracting officer faxed a letter to DCX concerning DCX's offers previously submitted for supplying the 120 volt distribution

box assemblies and cable assemblies desired by Government. In the letter Government reviewed the history of bidding. According to such review, DCX had offered on 29 August 1987 to furnish 45,712 cable assemblies at a unit price of $61.59 each for a total of $2,815,402 and 5,585 electrical distribution box assemblies at $473.13 each for an additional total of $2,642,431.05. DCX had revised its bid three times per Government's requests. The final DCX bid date was 10 September 1987. DCX's final bid was to supply the 45,712 cable assemblies at a price of $61.59 each and 5,585 distribution box assemblies at a price of $473.13 each. Incremental deliveries on 3 April 1988, 30 April 1988, 30 May 1988, 29 June 1988, 30 July 1988, 29 August 1988 and 27 September 1988 were to made. Such delivery dates were contingent upon Government making award of the contract no later than 4 September 1987. DCX's bid provided that the delivery schedule would be extended by the number of calendar days after 4 September 1987 that the contract was in fact awarded (R4 (37669), tabs 1, 1a, 1d)

13. Government's letter of 27 October 1987 also reviewed the fact that Government had previously requested DCX to verify its bid prices because a substantial difference in prices between the DCX bid and the prices bid by other bidders. Government indicated that it realized that DCX had confirmed its bid on 2 September 1987 but that Government wanted DCX again to review its bid work sheets and, in particular "all subcontractor quotations" since the disparity in prices might indicate an error in bid prices. Government also stated that it had learned during the preaward survey that DCX had not based its prices on direct quotations for some of the sole source components called for in the solicitation but had based bid prices on alternate parts not yet approved by Government. Government directed

DCX's attention to the precise language of paragraph 3.2 Materials and Components (finding 9) Government stated that it was concerned DCX might be misinterpreting the requirements of such paragraph. Government said that if DCX was awarded the contract it would be obligated to furnish the materials and components as specified in the drawings and specifications, even though DCX proposed furnishing alternate components, if Government refused to approve or accept such alternatives, if Government stated that DCX would not be entitled to an increase in the contract price or rescission of the contract if Government refused to accept or approve alternate components Government asked DCX for a written, unequivocal verification that its prices were correct and that it understood the meaning of paragraph 3.2. (R4 (37669), tab 1d)

14. DCX responded to Government's letter of 27 October 1987 by faxing back a letter the same day that verified its bid prices and assured Government that it understood the meaning of paragraph 3.2 (R4 (37669), tab 1f).

15. On 13 November 1987 Government was not satisfied with DCX's letter in response to Government's letter of 27 October 1987. Government telephoned DCX and made known its dissatisfaction with the reply. The president of DCX assured Government that when DCX submitted alternates for certain of the components specified it would, nevertheless, furnish the specified components if Government refused to approve or accept the alternate offered. (R4 (37669), tab 1h) DCX confirmed its telephone assurances by letter the same day (R4 (37669), tab 1i).

16. On 18 November 1987 DCX wrote to Government acknowledging that it had been awarded contract DLA400-88-C-5040 for the three phase, 208 volt, distribution box assemblies and that it was aware that it was the low bidder for the 120 volt distribution box assemblies and cable assemblies. DCX requested that a post award conference be held on the awarded contract "to clear up numerous technical problems and to review suggested changes and part substitutions" on such contract. DCX pointed out that at the time of a post award conference "Many problems can be clarified on the units to be delivered under Solicitation DLA400-87-B-6264 [the 120 volt distribution box assemblies and cable assemblies] as many of the parts are the same and interchangeable." DCX indicated that due to the short delivery time the conference was the only way to handle the situation. DCX requested that the contracting officer, the post award monitor and the technical representative, each from the DLA office in Richmond, Virginia, as well as the designer of the electrical distribution box assemblies and cable assemblies from the Natick Research and Development Center, be present. Two days were suggested as being necessary for the meeting. (R4 (37669) tab 109) Government was told that problems existed in its technical data packages that it had provided DCX for production of the electrical distribution box assemblies and cable assemblies (tr. 1/75, 121).

17. On 8 December 1987 Government's contracting officer signed an award of a contract numbered DL400-88-C-5081 which accepted DCX's offer to supply 120 volt electrical distribution box assemblies and cable assemblies. The award covered 45,710 cable assemblies to be delivered in seven incremental deliveries of 6,530 each commencing 17 March 1988 and to be completed by 27

September 1988 at a price of $61.59 each. The award also covered 5,580 distribution box assemblies at a price of $473.13 each with deliveries to be made in seven incremental deliveries starting 17 March 1988 and to be completed by 27 September 1988. The award stated that the delivery schedule included an extension of 90 calendar days pursuant to the Time of Delivery clause in the Invitation for Bids. The award further stated that it was confirmation of Government's "telegraphic acceptance dated 3 December 1987 with an effective date 3 December 1987." There is no evidence that the stated telegraphic acceptance was ever sent by Government or received by DCX. The award showed that it was mailed by Government at its office in Richmond, Virginia on 14 December 1978 to DCX at its office to Franktown, Colorado. One hundred one days elapsed between 4 September 1987 (the day upon which DCX made its bid delivery schedule offer contingent) and 14 December 1987 the date Government mailed the notice of award to DCX. (R4 (37669), tab l)

18. Contract DLA400-88-C-5081, covering the 120 volt box assemblies and cable assemblies, awarded by Government to DCX provided for Progress Payments to be paid to DCX. Both contracts DLA400-88-C-5040 and DLA400-88-C-5081 contained the following pertinent standard clauses:

FAR 52.212-15	Government Delay of Work (APR 1984)
FAR 52.232-7007	Progress Payments Alternate I (OCT 1986 Deviation)
FAR 52.233-1	Disputes (APR 1984)

FAR 52.243-1	Changes Fixed Price (APR 1984)
FAR 52.249-2	Termination for Convenience of the Government (APR 1984)
FAR 52.249-8	Default (Fixed-Price Supply and Service) (APR 1984)

(R4 (37669), tab 1a; R4 (37670), tab 1a)

19. On 17 December 1987 Government set up a post award orientation conference (PAOC) for contract DLA400-85-C-5081 to be held on two days at the end of December 1987 in Colorado (R4 (37669), tab 110).

20. On 18 December 1987 DCX wrote to Government as follows:

> We are in receipt of your letter dated 17 Dec 87 and will be prepared for the PAOC scheduled for 29 and 30 Dec 87.
>
> We wish to inform you that this PAOC should also include contract DLA400-88-C-5040. Many of the problems which exist on subject contract also exist on contract 5040.
>
> Virtually all the problems that exist will probably be answered by Mr. Art Claridge from NATICK. Numerous problems do exist, however, we will have ECP's [Engineering Change Proposals] prepared and do hope to resolve all the problems at this one meeting. In all cases we are prepared to discuss any

and all alternates.

Some of the ECP's to be submitted simply add additional sources for purchased material, however, a number of them do involve [sic] wrong material call-outs and will require lengthier discussions.

(Supp. R4 (37669), tab 2)

21. The post award orientation conference was held between various personnel of Government on 29 December 1987 in Denver, Colorado, and between the said personnel and representatives of DCX at DCX's place of business on 30 December 1987. The following Government personnel were in attendance:

Procuring Contracting Officer - Defense General Supply Center (DGSC), Richmond, VA

Administrative Contracting Officer - Defense Contract Administration Services Management Area (DCASMA), Denver, CO

Contract Administrator, DCASMA, Denver, CO

Quality Assurance Representative, DCASMA, Denver, CO

Quality Assurance Specialist, DCASMA, Denver, CO

Industrial Specialist, DCASMA, Denver, CO

Transportation Management Specialist, DCASMA,

Denver, CO

Equipment Specialist, DGSC, Richmond, VA

Engineer-Designer of Natick Research and Development Center, Natick, MA

The following personnel from DCX were in attendance:

President

Vice President (Technical Operations)

Vice President (Support Operations)

Project Engineer

Supervisor (Support Operations)

Quality Assurance Manager

(R4 (37669), tab 111; R4 (37670), tab 88b; tr. 1/22, 124, 127-28, 165, 166, 2/22)

22. At the PAOC DCX advised Government that the drawings and specifications that comprised the technical data packages for each of the contracts had been discovered by DCX upon close examination and study to be defective (tr. 1/146, 2/24). For example, it was shown by DCX that an ell bracket not shown on the contract drawings and specifications was required to be incorporated in the distribution boxes to support the proper mounting of the many wires that entered into and also departed from the box. A sample of the boxes, as previously produced by

Bruce Industries had been brought to the conference by Government's engineer, who had designed the boxes, so that DCX would be able to see how the boxes had been previously manufactured. When the sample box was opened at the conference it was discovered that Bruce Industries had installed such an ell bracket. (Tr. 1/148, 149, 2/23, 57, 187, 4/12-15, 18, 41) The contract drawings called for connecting five wires to a terminal board, but the board specified in the contract only contained places for four connections (tr. 2/123, 4/18, 41; exh. A13). The contracts required that DCX electrically ground the boxes; however, the contract plans and specifications provided no place for connecting the grounding wires which were essential to produce the electrically grounded boxes specified (tr, 4/19, 43; exh. A13). The contract drawings failed to provide a place or method for attachment to the boxes of six circuit breakers required by the contracts (tr. 4/22). The contract called for a switch to be provided which, if installed as shown, would interfere with the location of other components required by the contract (tr. 4/23-24). The contract drawings and specifications failed to specify the material desired in a molding that was needed for connection of T cables to the boxes (tr. 4/33-34). Government's design of covers for the distribution boxes demonstrated poor engineering practices. If the contract plans were followed as to the layout of screw holes, with the tolerances called for in the contract, the holes for the screws for attachment of a cover of the box frequently would not properly align causing excessive scrapping and unnecessary labor. (Tr. 2/124, 4/27-29, 31-32) Government's design of the cable assemblies failed to provide strain relief, thereby causing a potential safety hazard (R4 (37669), tab 3b; tr. 4/45-58). The safety hazard had been made known to Government during the prior

production of the units by Bruce Industries but Government had failed to correct its drawings for this procurement and said nothing about it to bidders for this procurement (tr. 3/18, 19).

23. DCX proposed at the PAOC a number of changes (approximately 155) to cure the defects in the drawings and specifications. DCX also offered to improve the designs by adding alternates for those components that in the existing drawings and specifications were limited to sole source of supply. DCX brought with it preliminary drawings of some of the recommended changes as well as samples of some of the alternative components it proposed. DCX offered, in effect, to re-engineer for Government the electrical distribution box assemblies and cable assemblies. (Tr. 1/133, 154, 156)

24. Government recognized the defects in its technical data packages and wanted to correct such defects promptly (tr. 2/130). Government made no protest about DCX's proposed changes. Government did not insist that DCX produce the distribution box assemblies and cable assemblies strictly in accordance with the plans and specifications of the respective contracts. (Tr. 1/137, 152-53, 162, 4/95) Government encouraged DCX to do the re-engineering and advised DCX to submit all of its proposed changes as formal Engineering Change Proposals (ECP) including Level III drawings prepared to Government's formats using Government furnished numbers for the drawings so that Government could utilize them for future procurement if it approved them (tr. 2/25, 31, 40, 4/90; exh. G1). Government further advised DCX that it would take Government approximately 30 days after receipt of the ECPs together with the Level III drawings to review

all the proposed changes and to either approve or disapprove them (tr. 2/27-28; exh. G1). Government promised that it would act quickly to approve or disapprove if DCX would submit the drawings as desired by Government (tr. 4/93). DCX indicated that it hoped to recover some of its costs of preparing the drawings as desired by Government and the costs of re-engineering the assemblies by some of the cost savings that were hoped to arise out of the changes (tr. 4/90-91). Government wanted the electrical delivery box assemblies and cable assemblies corrected, improved, and re-engineered but hoped the price would not change (tr. 4/89).

25. At the conclusion of the conference DCX turned over its preliminary ECP drawings to Government's engineer from Natick Research and Development Center and promptly started work upon preparing the ECPs and drawings (tr. 1/133, 155, 2/25; exh. G1). Government's personnel returned to their respective offices. Government did not instruct DCX to perform the contracts strictly in accordance with the plans and specifications of the respective contracts. Likewise, Government did not advise DCX to do nothing further with the proposed ECPs. (R4 (37669), tab 111; Supp. R4 (37669) tab 3; R4 (37670), tab 88b; tr. 1/62, 2/25; exh. G1).

26. On 29 January 1988 DCX wrote to Government as follows:

> In accordance with our meeting on 30 December 1987, DCX, Inc., submits the following:
>
> A. Due to the large number of ECP's presented during the meeting, DCX, Inc., offered to

re-engineer the hardware to be delivered under subject contracts.

1. The drawings will be Class III and on NATICK format. The NATICK format will be supplied by Art Claridge from NATICK.

2. Complete drawings will have been submitted to NATICK, via the A.C.O., for NATICK concurrence prior to first shipment. Final drawings, on mylar, will be submitted to NATICK prior to or concurrent with the final contract shipment.

3. Any drawing changes, after NATICK concurrence as specified in paragraph 1 will be submitted via E.C.P. route for DCX, Inc., incorporation into drawings prior to final submittal to NATICK.

4. DCX, Inc., will retain MRB [material review board] authority for the two subject contracts only.

5. DCX, Inc., will relinquish all rights in Data and transfer such to the U.S. Government at "No Cost" in consideration for appropriate contract extensions and the inclusion of "Progress Payments" into subject two contracts.

B. Cost impact, either debit or credit, are currently being evaluated. Due to the large number of ECP's, this effort may take several weeks.

C. Any concurrence from your office and NATICK is required to allow DCX, Inc., to order materials and it is suggested that the contract delivery dates be established from the date of NATICK's preliminary approval.

Thank you for your continued cooperation.

(R4 (37669), tab 112; R4 (37670), tab 81)

27. Government received from DCX the ECPs and drawings at the end of January 1988. There were 181 ECPs. Government's design engineer at the Natick Research and Development Center turned the DCX ECPs and drawings over to his chief subordinate engineer on 1 February 1988 for review and recommendations as to approval or disapproval (tr. 2/27-28, 179). The review was not completed within 30 days as originally promised by Government. However, there was much communication between the parties concerning the ECPs. (Supp. R4 (37669), tabs 6, 7, 8; Supp. R4 (37670), tabs 6, 7, 8; exh. A3; tr. 2/41) Government not only kept in constant touch with DCX but it also made regular visits to DCX's plant to observe any progress made by DCX in performing the contracts. Government observed on its 5 February 1988 visit to DCX's plant that DCX was procuring materials and components (tr. 2/159, 161). Government at such time also observed that DCX had purchased components from other manufacturers and had hired many new employees (tr.

2/164-65). DCX had been advised by Government engineers as of 10 February 1988 that Government engineers were going to recommend approval of a number of the ECPs and that such engineers wanted DCX to put all of the recommended for approval ECP drawings in final form such that Government could utilize them in subsequent procurement. (Tr. 1/218; exh. A3)

28. The Government's contracting officer realized as early as January 4 1988 that DCX's performance of the contracts would be delayed by Government's failure to approve or disapprove the ECPs in a timely manner (tr. 3/104-05). As of 14 March 1988 Government's engineering approval or disapproval recommendations as to the ECPs still had not been received by the contracting officer. DCX's reports on its progress in performance of the contracts indicated that revised delivery schedules for the electrical distribution box assemblies had not been established "pending approval of the DCX drawings" (R4 (37669), tab 114).

29. As of 24 March 1988 Government's engineers still had failed to recommend approval or disapproval of the ECPs. DCX warned Government that the distribution boxes could not be manufactured strictly following the final contract drawings and specifications. DCX also warned that the existing contract delivery schedule could not be met because of Government's delays (R4, 37669, tab 117). By letter dated 29 March 1988 DCX confirmed its earlier warnings and suggested that if Government would approve the ECPs no later than 15 April 1988 DCX could begin deliveries promptly with allowance for the time lost between award of the contract and approval of the ECPs. (R4 (37669), tab 118; R4 (37670), tab 90)

30. When Government's engineers still failed to recommend approval or disapproval of the ECPs during April 1988 the contracting officer knew that the existing delivery schedules would have to be changed. She did nothing to insist upon performance of the contracts according to the existing schedules. She planned to negotiate revised delivery schedules as soon as her engineers' recommendations were received. (Tr. 3/104-08)

31. On 1 April 1988 the parties conferred concerning the costs to Government if it accepted some or all of the ECPs. DCX offered to perform the contracts at no increase in cost to Government if Government would accept all the ECPs that had been offered by DCX. DCX believed it could offset its costs of the re-engineering and preparing the drawing revisions by savings it hoped to obtain from adoption of all the ECPs. However, DCX warned Government that the contracts would have to be modified as soon as possible if changes to the delivery schedules were to be kept at a minimum. (R4 (37669), tab 119; R4 (37670), tab 87; tr. 4/90-91)

32. Prior to arrival of the earliest delivery dates shown in the contract awards, namely 17 March 1988 in contract DLA400-88-C-5081 and 7 April 1988 in contract DLA400-88-C-5040, DCX advised Government that it would not be able to meet such delivery dates because of Government's failure to make decisions on the ECPs. (R4 (37669), tabs 114, 117, 118; tr. 3/103, 104, 105, 106, 108, 4/94, 96)

33. As of 26 April 1988 Government's engineer assigned to review the ECPs still had not completed his review and still had not advised the contracting officer

whether or not to accept or reject the ECPs. The revising engineer knew that many of the ECPs would improve the distribution box assemblies and cable assemblies and would benefit Government. He had decided to recommend approval of many or the ECPs. However, he was upset because he believed some of the ECPs might economically benefit DCX. Accordingly, he decided to visit DCX's plant in Colorado. The engineer together with other Government personnel, including the Administrative Contracting Officer, visited DCX. They observed that DCX was engaged in production of the electrical distribution box assemblies under the assumption that the ECPs would be approved. They saw that DCX had produced "a vast majority of the contracted components of each box." It appeared to Government that DCX could have made the first few shipments required except for the lack of a few long lead time components. Despite DCX's repeated stressing to Government that Government should act promptly upon approving the ECPs so that early deliveries of the assemblies would be made, Government's engineer was more concerned that DCX had proceeded with production without Government's having provided written approval of the ECPs than the fact that failure to approve or disapprove the ECPs was delaying deliveries of the products. Government's engineer once again discussed the merits of the ECPs with DCX, advised DCX that many of the ECPs would be approved, but said nothing to DCX about ceasing any further production of the assemblies in accordance with the ECPs. Government's engineer decided to again review the ECPs "to insure a thorough investigation into their merits." Government was unconcerned that additional time consumed to approve or disapprove the ECPs would cause DCX a loss of production time and existing delivery schedules in the contracts could not be met. (R4 (37669), tab 121; R4 (37670), tab 89;

Supp. R4 (37669), tab 17; Supp. R4 (37670), tab 17; tr. 1/175, 177-78, 181-82, 184, 2/28-29, 3/76-78, 109, 4/88, 95)

34. On 11 May 1988 the Natick Research and Development Center wrote to the contracting officer advising her which of the ECPs should be accepted and which should be rejected on each contract. Seventy four were recommended for approval, 28 were recommended to be rejected and three alternates were suggested for the 120 volt distribution box assemblies and cable assemblies and 55 were recommended to be approved, 20 were recommended to be rejected, and two alternates were suggested for the three phase, 208 volt, distribution box assemblies. The contracting officer was also advised to approve use of certain DCX drawings and for DCX to complete certain Level III drawings for Government's future use. Upon receipt of the foregoing information by the contracting officer in Richmond, Virginia, the information was conveyed to DCX by telephone. Government further advised DCX that the recommended changes still had not been incorporated into the contracts. (R4 (37669), tabs 125, 126; R4 (37670), tabs 91-93; tr. 2/41, 42, 43, 187, 189, 192-93, 207, 209, 222, 226, 232, 238, 246, 3/6-7, 113, 4/88)

35. On 12 May 1988 the parties conversed via telephone concerning the ECPs recommended for acceptance and rejection. DCX indicated that it had previously withdrawn some of the ECPs that Government had recommended to be rejected, that some of the ECPs recommended for approval with modifications were acceptable to DCX, that the reviewing engineer for Government had indicated that some of the rejected

components might be accepted after testing or receipt of further information and that DCX would be permitted to qualify for approval certain alternate components (but such procedures might slightly delay deliveries), that if DCX was required to rework some of the distribution box assemblies that were already in process Government's insistence upon single source items could create problems in meeting the deliveries desired by Government, and that DCX's prior offer to make the changes at no increase in cost to Government was predicated upon DCX being able to offset its increased costs arising out of formulating the ECPs via cost saving if all the ECPs were approved. DCX advised Government that it still was willing to perform the contract with no cost increases to Government but only if all the ECPs were approved. If Government wanted DCX to perform the contract with only those ECPs it had indicated it was going to approve, then DCX would have to insist upon its rights to equitable adjustments in the prices and times for deliveries. DCX indicated that it would attempt to meet the 30 September 1988 deliveries desired by Government but believed that the differences over the rejected ECPs could be worked out if a meeting was convened between the parties. (R4 (37669), tab 127; tr. 3/113)

36. On 16 May 1988 the contracting officer directed Government representatives to stop all progress payments being processed under both contracts, to refrain from having any conversations with DCX, to not have any conferences with DCX, and to advise DCX accordingly. The contracting officer indicated that she was reviewing and evaluating the contracts hoped such would be completed not later than 24 May 1988. (R4 (37670), tab 94) As of 16 May 1988 Government had previously paid DCX's requests

for progress payments amounting to an aggregate of, under contract DLA400-88-C-5081 (the 120 volt distribution box assemblies and cable assemblies) $561,070. (R4 (37669), tab 131; R4 (37670), tab 96; tr. 1/129) DCX had submitted and had pending payment a request for a progress payment amounting to $734,978 and had ready for submittal to Government another request for progress payment amounting to $442,139. (R4 (37669), tab 136)

37. We find as late as 11 May 1988 that DCX had been proceeding "apace with the contract" with the knowledge of all parties concerned. DCX assumed, based upon conversations and actions of Government personnel, that all ECPs would be approved. During the visit of Government's engineer to DCX in April, DCX was led to believe almost all the ECPs were ready to be approved and that the few remaining unapproved would soon be approved upon the receipt of additional information. DCX was almost ready to start making deliveries when it was told by Government that some of the ECPs were not approved. DCX believed that disapproval of ECPs was unfair and placed DCX in a disadvantageous position. DCX by letter of 18 May 1988 asked for a meeting to discuss how DCX was to proceed. (R4 (37669), tab 128; R4 (37670), tab 95)

38. On 23 May 1988 Government visited DCX's manufacturing facilities and determined that DCX had completed about 74 to 80% of the performance of the 120 volt distribution box assemblies and cable assemblies contract and approximately 94 to 99% of the three phase, 208 volt, box assembly contract. Such performance had been accomplished following all the ECPs that had been presented. DCX was asked by Government whether DCX could complete the contracts following the ECPs that

Government intended to approve but without the ECPs that Government intended to disapprove. DCX advised that it was willing to rework the products to conform to Government's proposed acceptance and rejection of ECPs but that the deliveries would be delayed. DCX estimated that it would be delayed but that completion of delivery could be accomplished in November 1988. (R4 (37669), tab 130)

39. As of 7 June 1988 the contracting officer had decided that it was in the Government's best interest to accept the ECPs that had been recommended for approval by its engineers because Government would be getting better products with cost ratings and DCX would be able to deliver sooner. The contracting officer advised the Government personnel involved that a change order was to be issued requiring the ECPs that had been recommended for approval on 11 May 1988 by Government's engineers. (R4 (37669), tab 134; R4 (37670), tab 98)

40. On 8 June 1988 the contracting officer called DCX via telephone and advised DCX of her decision. She advised that Government had to have the distribution box assemblies and cable assemblies by 1 October 1988, and that Government was going to issue the change orders incorporating the recommended for approval ECPs. (R4 (37669), tab 135; R4 (37670), tab 99)

41. On 9 June 1988 DCX wrote to Government advising that the progress payments being held up by Government were causing a devastating cash flow problem for DCX. DCX pleaded that it would have to lay off 80% of its work force and that further work would have to be suspended if the progress payments to which DCX was

entitled were not paid promptly. DCX clearly indicated that it wished to perform the contract. (R4 (37669), tab 136)

42. On 10 June 1988 the contracting officer wrote to DCX as follows:

> Reference is made to Contracts DLA400-88-C-5040 and DLA400-88-C-5081.
>
> Provided is a copy of the letter forwarded to this Center containing the approvals or disapprovals of the ECPs submitted by your firm, in which the Contracting Officer has concurred with Natick's findings.
>
> Request your firm review this listing and advise this Center not later than 13 June 1988, 12 Noon, to the following in writing:
>
> a. Can/will DCX manufacture subject material in accordance with ECPs with approvals/modifications/ disapprovals so stated in block 23 of each ECP?
>
> b. Can/will DCX deliver subject material not later than 15 September 1988.
>
> Provided are copies of the ECPs approved with modifications as shown in block 23 of each ECP and cited in Para (2) and (3) of Natick's letter dated 11 May 1988.

(R4 (37669), tab 137; R4 (37670), tab 100a; tr. 3/114)

43. The contracting officer's letter of 10 June 1988 was answered by DCX on the same day. DCX stated that it had done its part of the re-engineering of the assemblies in approximately four weeks whereas Government had taken substantially longer just to review the ECPs and to decide what it wanted and what it did not want. Moreover, DCX argued that Government wanted a decision from DCX as to whether it could produce the assemblies with some, but not all, of the changes within less delivery time than provided originally in the contract and Government wished DCX to answer, or decide whether it could so perform with approximately only one day to so decide. DCX argued that the contracting officer's demands were unreasonable. DCX asked for additional time (2 weeks) to review the matter and to provide a response to Government's questions. (R4 (37669), tab 138; R4 (37670), tab 100b)

44. On 13 June 1988 the contracting officer telephoned DCX and advised that DCX was in default of performance on both contracts, that Government could, as of that moment, terminate the contracts, and that the contracting officer wanted to know whether DCX could produce the 120 volt distribution box assemblies and cable assemblies in accordance with the ECPs approved by Government and the three phase, 208 volt, box assemblies in accordance with the ECPs approved by Government as spelled out in the contracting officer's letter of 10 June 1988. She also wanted an answer as to whether DCX could furnish such items by 15 September 1988 and 27 September 1988, respectively. The contracting officer further stated that she would not give DCX two weeks to respond as requested and that the answers to her questions had to be received by 12:00 Noon, E.S.T. on 15 June 1988 or she would have to terminate the contracts and obtain the items

elsewhere. (R4 (37669), tab 139; 24 (37670), tab 101)

45. On 14 June 1988 DCX's attorney called the contracting officer. DCX wanted an opportunity to convince Government of the desirability of approving the approximately 50 ECPs that Government had not approved. DCX pleaded that Government release the progress payments being withheld by Government so that DCX could continue performance of the contracts while the question of whether or not Government should accept the remaining unapproved ECPs was resolved and DCX determined what costs and equitable adjustments would be needed to produce the assemblies in accordance with only a portion of the ECPs approved. DCX wanted to attempt to move forward without any increased cost to Government provided it could offset its increased costs and delays with some savings through the approved ECPs. The contracting officer refused to answer DCX as she wanted to consult with Government's attorneys. (R4 (37669), tab 140; R4 (37670), tab 102)

46. On 15 June 1988 the contracting officer responded to DCX's attorneys' pleas by sending Show Cause letters to DCX. The letters indicated that DCX had failed to perform the contracts within the time respectively called for in the contracts, that Government was considering terminating the Contracts for default in performance, and that pending a final decision Government wanted to determine whether the failures to perform arose out of causes beyond DCX's control and without fault or negligence on DCX's part. DCX was advised to reply within 10 days of receipt of the letters. (R4 (37669), tab 141; R4 (37670), tab 103; tr. 3/120) There was no evidence as to when DCX received the Show Cause letters.

47. On 17 June 1988 Government advised DCX that it would not pay any additional progress payments unless DCX would submit a revised Request for Progress Payments. Such revised request had to segregate out of the request any costs that might have arisen for labor, materials or other costs associated with components, materials or labor covered by the ECPs (since none of the ECPs had been incorporated into the contracts). Government also advised DCX that if DCX had included costs associated with the ECPs in previous requests for progress payments such portion of any progress payments previously paid amounted to overpayments for which Government reserved the right to demand refunds. (R4 (37669), tab 143)

48. On 20 June 1988 nine representatives from Government met with seven representatives from DCX at the Defense General Supply Center in Richmond, Virginia, to discuss performance of the contracts. Each side presented its arguments as to why performance had come to a halt. DCX argued that it needed the payment of progress payments, that DCX had proceeded with performance of the contracts under the assumptions that most, if not all, of the ECPs were approved or to be approved. DCX claimed that it based such assumptions upon Government's actions and inactions. DCX stated it was ready to start shipping within 30 days, that all delays had been caused by Government, that DCX had done everything it had offered to do at the post award conference and that it was continuing to do everything it could do to deliver the products needed by Government within a reasonable time. DCX offered to resolve any disputes between the parties remaining unsettled, and to do whatever was reasonably required to complete performance of the contract. DCX asked Government to incorporate into the Contract the ECPs that

had been recommended for approval by Government's engineers, to accept those non-Government approved alternate components via waivers where possible with guarantees from DCX as to the form, fit and performance of such alternate components, and to release progress payments then due and to become due. DCX indicated it anticipated being able to make the first deliveries within eight weeks and to complete all deliveries within 16 weeks. (R4 (37669), tabs 145, 147, 148; R4 (37670), tabs 106, 109, 114; tr. 3/120-21, 125-26, 4/98). DCX asked Government to reconsider its unapproved ECPs (tr. 3/82).

49. On 21 June 1988 the conference between the parties continued in Richmond, Virginia, to reconsider the unapproved ECPs. Government advised DCX that it could submit requests for deviations from the drawings and specifications of the contracts as well as requests for waivers from the requirements of the same covering the alternate components or materials DCX wished to use as proposed in the ECPs that had not been approved by Government. Likewise, DCX was advised that it could submit test results and additional information concerning those alternate materials and components DCX wished to utilize in the distribution box assemblies. Government reconsidered the ECPs it had previously disapproved and decided to approve 40 of such previously disapproved ECPs. Of the remaining unapproved ECPs only six issues remained unresolved between the parties, i.e.

1. Substitution of patented snap covers with similar covers manufactured by DCX.

2. Substitution of a cover gasket with a similar but different material.

3. Substitution of a circuit breaker having a plastic toggle in lieu of a circuit breaker having a metal toggle.

4. Deletion of connector gaskets.

5. Deletion of a ground wire between duplex receptacles.

6. Use of components lacking a military standard designation.

(R4 (37669), tab 147; R4 (37670), tabs 109, 113; tr. 2/81, 97, 194-85, 198, 202-03, 207, 209, 214-15, 222, 3/83, 86, 87-88, 125-26, 137, 140, 166, 4/74-76)

50. At the conclusion of the June 1988 conference between the parties Government had agreed to permit DCX to submit additional data and information for Government's consideration in DCX's efforts to obtain waivers of some requirements and to permit deviations from certain portions of the contract drawings and specifications. However, the parties had not agreed upon new or revised contract delivery schedules. During the entire time that Government had been reviewing and considering the ECPs the contracting officer deemed that the delivery schedules were not critical to Government's needs. As of 25 June 1988 the contracting officer was still considering whether or not to accept alternate components proferred by DCX for the distribution box assemblies. DCX was still submitting additional data and information in its effort to gain Government's approval of the remaining unapproved ECPs (Supp. R4 (37669), tabs 19, 20, 21, 22; R4 (37670), tabs 110a, 110b, 111, 112; tr. 3/125-26, 146-47, 168, 175-76) All during the conferences

of 20 and 21 June 1988 DCX had never indicated that it would not perform the contracts if Government refused to approve all the ECPs (tr. 3/189). DCX never said it would not perform the contracts (tr. 1/114, 4/96-97). There was no evidence that Government ever insisted that DCX disregard all the ECPs approved or not approved and produce the electrical distribution box assemblies and cable assemblies in strict accordance with the drawings and specifications of the contracts as they existed.

51. At the aforesaid meetings in June, DCX told Government that it was quite willing to continue production of the contracts, but needed resumption of the progress payments and incorporation into the contracts of the ECPs that Government had approved, so that DCX could get its production inspected and approved by Government inspectors. Government advised DCX that the change orders covering the approved ECPs were being processed by Government. (Tr. 3/146-47, 168, 4/96-97, 100, 101)

52. On 24 June 1988 the contracting officer extended the date for receipt of DCX's answers to Government's Show Cause Orders to 29 June 1988 (R4 (37670), tab 110a).

53. On 28 June 1988 DCX answered the Show Cause Orders. It argued that it was not in default of performance, that the delays in deliveries were solely the fault of Government, that Government failed to keep its end of the bargain in the way it handled the ECPs needed to overcome the defective drawings and specifications of the contracts, that Government's cutoff of progress payments had made it difficult for DCX to obtain materials and threatened DCX's ability to supply the labor needed to

perform the contracts, and that Government's consumption of time in evaluating and deciding upon the ECP approvals and incorporation of such ECPs into the contracts had left DCX with insufficient time to perform. DCX outlined the history of its attempts to perform the contracts and Government's actions in response thereto. DCX in conclusion stated in pertinent part as follows:

RESOLUTION OF THE PROBLEM

> The Government's contribution to the delay notwithstanding, DCX maintains that the interest of the United States will best be served by resolving the issues in an amicable and timely manner.
>
> Upon approval of the ECPs, ECPs as modified, and waivers as applicable, the issuance of a corresponding change order or other contractual document, and the release and payment of progress payments due to date, DCX anticipates that it will be able to make the first delivery within eight weeks and complete all deliveries sixteen weeks thereafter.
>
> It was anticipated that the present contracts would be completed within five months of the nine months called for originally by utilizing a normal single shift. If the delivery must now be accelerated by going to a second shift, the Government will be expected to bear the additional expense of a twenty-five cent per hour pay differential and the attendant loss in efficiency. Additionally, the requirement to go to a second shift may impact on Contract Number DLA 400-88-C-5241 (lighting assemblies for the tent), however, DCX is confident

that any delay in delivery will be kept to an absolute minimum.

DCX stands ready, willing, and capable of completing these contracts in an expeditious and efficient manner. Accordingly, we request an early and favorable determination so that the DCX workforce can promptly proceed with production.

(R4 (37669), tab 148; R4 (37670), tab 114 tr. 3/121-23)

54. Government's contracting officer interpreted DCX's responses to the Show Cause Orders to mean that: DCX would proceed with performance in accordance with the ECPs that Government had agreed to accept and also in accordance with the ECPs that Government had agreed to accept with modifications; that such performance would include use of some components through waivers and acceptance of deviation requests (provided the same met Government standards); that DCX would complete its performance within eight to 16 weeks after Government issued the change orders necessary to properly modify the contract to conform to such agreed upon changes (provided Government also released the pending and future progress payments); and that DCX would even utilize overtime labor to speed performance if Government would assist with accompanying added costs. (tr. 3/121, 123, 169-70) The contracting officer was of the opinion that DCX had rightfully asked for resumption of progress payments and that DCX had offered a reasonable delivery schedule (tr. 3/174). However, the contracting officer interpreted DCX's statement of how the problems between them could be resolved and performance continued as amounting to a refusal to perform the contracts unless all the ECPs were

approved (tr. 3/124, 171-73, 174) She felt that DCX had not assured her that it was going to continue performance of the contract until they were completed (tr. 3/125, 194).

55. Since the contracting officer interpreted DCX's actions and response to the Show Cause Orders as being a refusal to perform she turned the matter over to Government's Termination Contracting Officer (TCO) for termination of the contracts (tr. 3/124, 126). The Default clause of each of the contracts provided in pertinent part as follows:

> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to ---
>
> > (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
> >
> > (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
> >
> > (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
>
> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of

the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for default of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

* * *

(g) If, after termination, it is determined that the Contractor was not in

> default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

56. The TCO reviewed Government's files on the contracts, made no contacts with DCX and terminated both contracts on 12 July 1988 for "failure to deliver the supplies in accordance with the established delivery schedule." (R4 (37669), tabs 1j, 151; R4 (37670), tab 1e; tr. 3/197, 200) The TCO was unaware that Government had agreed to review said consider requests for waivers and deviations from DCX as to materials and components offered and provided by DCX pursuant to the unapproved ECPs. The said contracting officer testified that he would not have terminated the contracts if he had been aware of such information. (tr. 3/202-03)

57. DCX was in production of the electrical distribution box assemblies and was planning to utilize overtime labor to speed up deliveries at the time it received notification of the terminations (tr. 4/102-03)

58. DCX duly appealed from each of the contracting officer's decisions.

DECISION

DCX contends that Government failed to prove that it was entitled to terminate the two contracts; that Government's plans and specifications for each of the contracts were defective; that Government's failure to correct its defective plans and specifications bars Government's right, if any, to terminate the contracts for

default in performance; that Government waived the delivery schedules and failed to establish new delivery schedules thus barring its rights to terminate for default in performance; that DCX did not repudiate the contract; and that DCX is entitled to have the terminations for default converted into terminations for the convenience of the Government.

Government argues that DCX was in default of performance as to both contracts because it failed to deliver in accordance with validly established delivery schedules; that Government did not waive the delivery schedules; that DCX's failures to deliver were without legal excuses; that DCX's responses to the Show Cause letters were repudiations of the contracts; and that Government's terminations of the contracts for default in performance were proper and should be sustained.

We agree with DCX's arguments that Government was not entitled to terminate the contracts for default in performance.

Neither DCX nor any other contractor could have built the products desired by Government if Government's contract drawings and specifications had been followed. To build the products desired by Government a contractor had to deviate from such drawings and specifications or obtain waivers from Government of some of the requirements of such drawings and specifications. Accordingly, the drawings and specifications were defective. Defective drawings and specifications which preclude completion of performance by the scheduled date(s) are a bar to Government's rights to terminate contracts for default in performance. Dynalectron Corporation v. United States,

518 F.2d 594 (Ct. Cl. 1975)

Moreover, even if, for the sake of argument, we found the drawings and specifications not to be defective (which we do not) Government waived the delivery schedules and never established new delivery schedules. In the absence of a delivery schedule a contractor cannot be found to be in default of meeting the delivery dates required in such nonexistent schedule. Cecile Industries, Inc., ASBCA Nos. 24600, 27265, 83-2 BCA ¶ 16,842. Here, Government failed to terminate properly either contract DLA400-88-C-5040 or DLA400-88-C-5081 within a reasonable time after the alleged default. Rather, the circumstances indicate forbearance by Government. DCX continued performance under each of the contracts In reliance upon Government's forbearance. Government did nothing to stop such performance of which it was aware, and sought DCX's agreement to produce in accordance with those ECPs the contracting officer had advised she would approve. Such actions and inactions show that Government waived the delivery schedule in each of the contracts. DeVito v. United States, 413 F.2d 1147 (Ct. C1. 1969) Furthermore, the contracting officer admitted that she was aware that the delivery dates had passed with no deliveries. She admitted that she intended to establish new delivery schedules. She, however, failed to incorporate new schedules into the contracts but, instead proceeded towards termination of the contracts.

We find no merit in Government's argument that DCX's responses to the Show Cause letters were repudiations of the contracts. A reasonable reading of DCX's responses, giving commonly accepted meaning to the statements contained therein, appears to us to be very plain

and straightforward statements that DCX had every intention of proceeding with performance of the contracts. Nowhere did DCX say or intimate that it would not perform or that it would only perform if Government approved all the ECPs.

We conclude that Government did not have the right to terminate the contract for default in performance. Pursuant to the terms of the Default clauses the Notices of Termination must be considered as having been issued pursuant to the Termination for Convenience of the Government clauses.

The appeals are sustained and the terminations for default are converted to ones for the convenience of the Government.

Dated: 19 May 1992

{Signature}
HERBERT C. HARPER
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I concur

{Signature}
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman,
Armed Services
Board of Contract Appeals

I concur

{Signature}
ALAN M. SPECTOR
Administrative Judge
Vice Chairman,
Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 37660 and 37670, Appeals of DCX, INC., rendered in conformance with the Board's Charter.

Dated: 21 MAY 1992

{Signature}
EDWARD S. ADAMKEWICZ
Recorder Armed Services
Board of Contract Appeals

APPENDIX F

Administrative Procedure Act

5 USC § 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

* * *

> **(C)** rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

* * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

* * *

> **(C)** administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. . . .

5 USC §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> **(D)** without observance of procedure required by law;
>
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX G

Federal Acquisition Regulations
48 CFR Ch. I (10-1-93 Edition)

49.402-3 Procedure for default.

(a) When a default termination is being considered, the Government shall decide which type of termination action to take (i.e., default, convenience, or no-cost cancellation) only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action.

(b) The administrative contracting officer shall not issue a show cause notice or cure notice without the prior approval of the contracting office, which should be obtained by the most expeditious means.

(c) Subdivision (a)(1)(i) of the Default clause covers situations when the contractor has defaulted by failure to make delivery of the supplies or to perform the services within the specified time. In these situations, no notice of failure or of the possibility of termination for default is required to be sent to the contractor before the actual notice of termination (but see paragraph (e) below). However, if the Government has taken any action that might be construed as a waiver of the contract delivery or performance date, the contracting officer shall send a notice to the contractor setting a new date for the contractor to make delivery or complete performance. The notice shall reserve the Government's rights under the Default clause.

(d) Subdivisions (a)(1)(ii) and (a)(1)(iii) of the Default clause covers situations when the contractor fails to perform some of the other provisions of the contract (such as not furnishing a required performance bond) or so fails to make progress as to endanger performance of the contract. If the

termination is predicated upon this type of failure, the contracting officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure. When appropriate, this notice may be made a part of the notice described in subparagraph (e)(1) below. Upon expiration of the 10 days (or longer period), the contracting officer may issue a notice of termination for default unless it is determined that the failure to perform has been cured. A format for a cure notice is in 49.607.

(e)(1) If termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination. This notice shall call the contractor's attention to the contractual liabilities if the contract is terminated for default, and request the contractor to show cause why the contract should not be terminated for default. The notice may further state that failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter at a conference. A format for a show cause notice is in 49.607.

(2) When a termination for default appears imminent, the contracting officer shall provide a written notification to the surety. If the contractor is subsequently terminated for default, a copy of the notice of default shall be sent to the surety.

(3) If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the designated disbursing officer specifically directing a change in address for mailing checks.

(4) If the contractor is a small business firm, the

contracting officer shall immediately provide a copy of any cure notice or show cause notice to the contracting office's small business specialist and the Small Business Administration Regional Office nearest the contractor. The contracting officer should, whenever practicable, consult with the small business specialist before proceeding with a default termination (see also 49.402-4).

(f) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

(g) If, after compliance with the procedures in paragraphs (a) through (f) of this 49.402-3, the contracting officer determines that a termination for default is proper, the contracting officer shall issue a notice of termination stating—

(1) The contract number and date;

(2) The acts or omissions constituting the default;

(3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;

(4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;

(5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;

(6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and

(7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause.

(h) The contracting officer shall make the same distribution of the termination notice as was made of the contract. A copy shall also be furnished to the contractor's surety, if any, when the notice is furnished to the contractor. The surety should be requested to advise if it desires to arrange for completion of the work. In addition, the contracting officer shall notify the disbursing officer to withhold further payments under the terminated contract, pending further advice, which should be furnished at the earliest practicable time.

(i) In the case of a construction contract, promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant that are on the site will be needed.

(j) If the contracting officer determines before issuing

the termination notice that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the Government's interest, the contracting officer may terminate the contract for the convenience of the Government.

(k) If the contracting officer has not been able to determine, before issuance of the notice of termination whether the contractor's failure to perform is excusable, the contracting officer shall make a written decision on that point as soon as practicable after issuance of the notice of termination. The decision shall be delivered promptly to the contractor with a notification that the contractor has the right to appeal as specified in the Disputes clause. .

[48 FR 42447, Sept. 19, 1983, as amended at 54 FR 48990, Nov. 28, 1989]

APPENDIX H

Defense Priorities and Allocations System

350.1 Purpose of this regulation.

(a) Title I of the Defense Production Act of 1950, as amended (50 U.S.C. app. 2061, *et seq.*) (Defense Production Act), authorizes the President: to require the priority performance of contracts and orders necessary or appropriate to promote the national defense over other contracts or orders; to allocate materials and facilities as necessary or appropriate to promote the national defense; and to require the allocation of, or the priority performance under contracts or orders relating to, supplies of materials and equipment in order to assure domestic energy supplies for national defense needs.

(b) This regulation consolidates, simplifies, and revises the Defense Materials System and the Defense Priorities System regulations, directions, and orders. The Defense Priorities and Allocations System (DPAS) helps to keep current national defense programs on schedule and provides an operating system that can be rapidly expanded in a national emergency.

(c) To aid in understanding and using the DPAS, an overview of its major provisions is incorporated into this regulation as Subpart B -- Overview. The full text of DPAS is found in Subparts D through L.

Subpart B—Overview

350.2 Introduction.

(a) The Federal Emergency Management Agency authorizes certain national defense programs for priorities and allocations support. For example, military aircraft production, ammunition, and certain programs which maximize domestic energy supplies are "authorized programs." A complete list of currently authorized programs is provided at Schedule I.

(b) To ensure the preferential treatment of certain contracts and orders for authorized programs, the Department of Commerce administers the DPAS.

(c) Commerce has delegated authority to place priority ratings on contracts or orders necessary or appropriate to promote the national defense to the government agencies that issue such contracts or orders. Schedule I includes a list of agencies delegated this authority. Copies of the Delegation of Authority are provided at Appendix I. They set forth the authorities delegated and those retained by Commerce.

350.3 Priority ratings and rated orders.

(a) Rated orders are identified by a priority rating consisting of the rating — either DX or DO - and a program identification symbol. Rated orders take preference over all unrated orders as necessary to meet required delivery dates. Among rated orders, DX rated orders take preference over DO rated orders. Program identification symbols indicate which authorized program is involved with the rated order. For

example, A1 identifies defense aircraft programs and A7 signifies defense electronic programs. The program identification symbols, in themselves, do not connote any priority.

(b) Persons receiving rated orders must give them preferential treatment as required by this regulation. This means a person must accept and fill a rated order or items that the person normally supplies. The existence of previously accepted unrated or lower rated orders is not sufficient reason for rejecting a rated order. Persons are required to reschedule unrated orders if they conflict with performance against a rated order. Similarly, persons must reschedule DO rated orders if they conflict with performance against a DX rated order.

(c) All rated orders must be scheduled to the extent possible to ensure delivery by the required delivery date.

(d) Persons who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill the orders. This provision ensures that suppliers will give priority treatment to rated orders from contractor to subcontractor to suppliers throughout the procurement chain.

(e) Persons may place a priority rating on orders only when they are in receipt of a rated order, have been explicitly authorized to do so by the Department of Commerce or a Delegate Agency, or are otherwise permitted to do so by this regulation.

350.5 Special priorities assistance.

(a) The DPAS is designed to be largely self-executing.

However, from time-to-time production or delivery problems will arise. In this event, special priorities assistance is available from Commerce and from the Delegate Agencies.

(b) Special priorities assistance is available for any reason consistent with this regulation. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or to verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items not automatically ratable.

350.7 Compliance.

(a) Compliance with the provisions of this regulation and official actions is required by the Defense Production Act. Violators are subject to criminal penalties.

(b) Any person who places or receives a rated order should be thoroughly familiar with, and must comply with, the provisions of this regulation.

350.11 Priority ratings.

(a) *Levels of priority.* (1) There are two levels of priority established by this regulation, identified by the rating symbols "DO" and "DX".

(2) All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over DO rated orders and unrated orders. (For resolution of

conflict, among rated orders of equal priority, see section 350.14(c).)

(3) In addition, a Directive issued by Commerce takes preference over any DX rated order, DO rated order, or unrated order, as stipulated in the Directive. (For a full discussion of Directives, see section 350.62.)

(b) *Program identification symbols.* Program identification symbols indicate which authorized program is being supported by a rated order. The list of authorized programs and their identification symbols are listed in Schedule I. For example, A1 identifies defense aircraft programs and A7 signifies defense electronic programs. Program identification symbols, in themselves, do not connote any priority.

(c) *Priority ratings.* A priority rating consists of the rating symbol - DO and DX - and the program identification symbol, such as A1, B2, or H6. Thus, a contract for the production of an aircraft will contain a DO-A1 or DX-A1 priority rating. A contract for a radar set will contain a DO-A7 or DX-A7 priority rating.

350.14 Preferential scheduling.

(a) A person must schedule operations, including the acquisition of all needed production items, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO rated orders must be given production preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery against unrated orders. Similarly, DX rated orders must be given preference over DO rated orders and unrated orders.

> Examples: If a person receives a DO rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX rated order is received calling for delivery on July 15 and a person has a DO rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX rated order.

(c) If a person cannot fill all the rated orders of equal priority status received on the same day, the person must accept those orders which can be filled which have the earliest delivery dates. For example, the person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. For those orders which cannot be filled on time, the supplier must inform the customer within the time limits set forth in section 350.13(d), of the earliest date on which delivery can be made and offer to accept the order on the basis of that date.

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date,

the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in section 350.17(b).

Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

(2)

No. 96-252

In the Supreme Court of the United States

OCTOBER TERM, 1996

DCX, INC., PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the decision of the Armed Services Board of Contract Appeals that the Department of Defense properly terminated for default its contract with petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-252

DCX, INC., PETITIONER

v.

WILLIAM J. PERRY, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is reported at 79 F.3d 132. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 15a-34a) is reported at 94-2 BCA (CCH) ¶ 26,661.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1996. A petition for rehearing was denied on May 16, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on August 14, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 1, 1988, the Department of Defense awarded a contract to petitioner to produce flourescent light sets for use in medical tents. Pet. App. 20a. The contract required petitioner to perform various tests prior to delivery of the light sets, and to provide the government with a First Article Test Report (FATR) by June 30, 1988. *Id.* at 17a, 20a. The contract specified that, if petitioner failed to deliver the FATR on time, petitioner "shall be deemed to have failed to make delivery within the meaning of the Default clause of this contract." *Id.* at 18a-19a.

Petitioner subcontracted the required testing to Ball Brothers Aerospace Systems (Ball). Pet. App. 21a. Ball, however, did not commence the testing on schedule. On June 17, 1988, petitioner advised the government that Ball would not complete the testing process until July 11 and that the FATR would not be available until July 12. Petitioner blamed the delay on the government's Defense Priorities and Allocations System, which it claimed required Ball to postpone petitioner's tests in favor of higher priority government contracts. *Id.* at 26a. The contracting officer responded on July 1, advising petitioner that it was in default, but agreeing to forbear termination untii July 12, as petitioner had requested. *Id.* at 27a. Petitioner, however, failed to deliver the FATR by the extended due date of July 12. *Id.* at 28a. On July 13, the contracting officer, having received no explanation for the further delay or request for an additional extension, terminated the contract for default. *Id.* at 9a, 28a, 30a.

2. Petitioner sought review of this determination before the Armed Services Board of Contract Appeals

(ASBCA), alleging that the failure to deliver was caused by the government's priority system, and that the termination for default was arbitrary and capricious because it failed to comply with the applicable regulations. The ASBCA disagreed and upheld the contracting officer's decision. Pet. App. 15a-34a. The ASBCA found that "[t]here was insufficient evidence by [petitioner] to prove that Ball's actions in delaying starting its testing of the First Article was caused by Governmental action." *Id.* at 32a. Likewise, the ASBCA was "not persuaded by the evidence that [the] Government's termination of the contract for default in performance was improperly carried out or the result of arbitrary and capricious behavior on the part of the contracting officer." *Id.* at 33a. The ASBCA specifically found that the contracting officer had "adhered to the contract['s] specific terms covering nondelivery of the FATR as well as the applicable Federal procurement regulations." *Ibid.*

3. Petitioner then sought review in the Federal Circuit. That court affirmed, holding that the ASBCA was "warranted in finding that [petitioner's] failure to perform was attributable to its own negligence * * * rather than to the operation of" the government's priority system. Pet. App. 7a. The court of appeals also found "nothing in the record to persuade [it] that the termination contracting officer acted arbitrarily or capriciously in terminating the contract when he did." *Id.* at 9a.

ARGUMENT

The court of appeals' decision affirming the termination of petitioner's contract is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the primary issue raised

by petitioner is not squarely presented. Accordingly, further review of this case is not warranted.

1. The ASBCA correctly concluded that the contracting officer's decision was not arbitrary or capricious, finding that the contracting officer had abided by the contractual terms as well as the applicable federal regulations. Pet. App. 33a. Petitioner provides no basis for setting aside that finding. See 41 U.S.C. 609(b) (fact-finding of ASBCA "shall be final and conclusive" unless "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if * * * not supported by substantial evidence"). The court of appeals upheld the ASBCA's determination "that the termination contracting officer adhered to both the terms of the contract and the requirements of the applicable procedural regulations." Pet. App. 7a. Further review of this factual issue is not warranted.

2. Petitioner argues (Pet. 10-18) that this Court should review the issue of whether the Federal Acquisition Regulation provisions regarding default confer rights upon government contractors. Specifically, petitioner points to 48 C.F.R. 49.402-3(f) (Pet. App. 81a), which says that a contracting officer "shall consider" seven enumerated factors when assessing whether to terminate a contract for default.

Whether 48 C.F.R. 49.402-3(f) confers rights upon government contractors, however, is not squarely presented by this case: The court of appeals held that the contracting officer complied with that provision here, concluding that the "officer's contemporaneous memorandum and hearing testimony demonstrate that he addressed the pertinent regulatory factors and found that they did not counsel against termination under the circumstances of this case." Pet App.

8a. The ASBCA likewise concluded that the contracting officer had complied with the applicable regulations. *Id.* at 33a. As a result, determining whether 48 C.F.R. 49.402-3(f) confers rights on contractors is not necessary to the resolution of this case.

After finding that petitioner's claim of a regulatory violation was without merit, the Federal Circuit held alternatively that 48 C.F.R. 49.402-3(f) "does not confer rights on a defaulting contractor." Pet. App. 8a. As the court of appeals explained, it was following the established precedents of the Boards of Contract Appeals in holding that, if—unlike the present case—a contracting officer failed to consider one or more of these factors, his decision to terminate a contract for default would not necessarily be overturned as an abuse of discretion. Instead, the noncompliance "may aid a Board of Contract Appeals or a court in determining whether a contracting officer has abused his discretion in terminating a contract for default." *Ibid.* There is no warrant for this Court to review this alternative holding of the expert court and boards to which Congress has entrusted primary responsibility for resolving government contracts disputes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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October 25, 1996

PARTIES TO THE PROCEEDING

The parties to the proceeding remain the same as described in the Petition. The petitioner, named in the caption, was plaintiff and appellant below. DCX, Inc. is a publicly traded corporation. DCX, Inc. owns one closely held subsidiary, GeoStar International, Inc, doing business as GeoNova International, Inc.

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REPLY BRIEF FOR THE PETITIONER

THE JUXTAPOSITION OF THE GOVERNMENT'S BRIEF IN OPPOSITION AND THE BRIEF OF *AMICI* IN SUPPORT OF PETITIONER PRESENTS A CONSTITUTIONAL QUESTION

The Government's Brief in Opposition begs the most fundamental of questions: How could the Federal Circuit ever find the conduct of a contracting officer to be arbitrary and capricious if, as a matter of law, a contracting officer has no duty to make any inquiry into the excusability of the contractor's delay, or to consider any of the other factors enumerated in the Federal Acquisition Regulations ["FAR"]

§49.402-3(f)? *See, e.g., DCX* v. *Perry*, 79 F.3d 132, 135 (Pet. App. 8a-9a). Indeed, a pre-deprivation hearing in which the contracting officer is required to make reasoned inquiry into the excusability of the contractor's delay, as well as the other factors enumerated in FAR §49.402-3(f), is a necessary predicate to judicial review of a default termination.

The Brief of *Amici Curiae,* the Contract Electronics Association, the Colorado Association of Commerce and Industry, Ophir Corporation, and Defenders of Property Rights, addresses this issue by focusing and expanding upon the related due process concerns noted in the Petition. Pet. at 22 *citing* KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., II ADMINISTRATIVE LAW TREATISE §9.1 at 2 (3d ed. 1994). The *Amici* articulate these concerns as the question, "Whether the Due Process Clause of the Fifth Amendment requires a government agency to provide notice and a pre-deprivation hearing before terminating a procurement contract for default?".

The Government's Brief in Opposition seeks to dismiss this entire question, addressed in the Petition as an issue arising under the Administrative Procedure Act ["APA"], Pet. at 10-18, by characterizing it as a mere "alternative holding" "not squarely presented" to this Court. *See* Br. Opp. at 4-5. The Federal Circuit's failure to bind the Government to the default termination criteria published at FAR §49.402-3(f), however, creates an illusory standard of review under which virtually every default termination may be made out to be supported by substantial evidence, thereby rendering judicial review ineffective.

This Reply addresses the issues which arise from the juxtaposition of the Government's Brief in Opposition and the Brief of *Amici* in Support of Petitioner.

THE FAR PROVIDES A PRE-DEPRIVATION HEARING FOR DEFAULT TERMINATIONS IN ORDER TO COMPLY WITH THE REQUIREMENTS OF DUE PROCESS

As a preliminary matter, when considering whether Constitutional due process has been abrogated, it is necessary to identify the nature of the interest involved, and then to decide what form of process most appropriately protects that interest. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW at §§10-12,-13,-14 (2d ed. 1988). A precise resolution of these questions with regard to this case is beyond the scope of this document. However, the framers of the FAR -- The FAR Council[1] -- appeared to recognize that the default termination process implicates a contractor's property interest, and provided for a pre-deprivation hearing prior to the termination of a procurement contract for default. *See* FAR §49.402-3(e)(1) ("If termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination ... and request the contractor to show cause why the contract should not be

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[1] The FAR Council was established under the auspices of the Office of Federal Procurement Policy while implementing Congressional directives to centralize policy and leadership in the area of federal government procurement. *See generally* legislative history of the Office of Federal Procurement Policy Acts, 88 Stat. 796, P.L. 93-400, 93D CONG., 2D SESS., 3 1974 U.S.C.C.A.N. 4589, *and* 93 Stat. 648, P.L. 96-83, 96TH CONG., 1ST SESS., 2 1979 U.S.C.C.A.N. 1492; 97 Stat. 1325, P.L. 98-191 (1983); Final Rule Establishing the Federal Acquisition Regulation, 48 CFR Ch. 1, 48 FR 42102 (September 19, 1983).

terminated for default."). Thus, the FAR affords contractors a pre-deprivation hearing -- notice and opportunity to show cause why the contract should not be terminated for default. *See* TRIBE at §10-14 n.30 *citing Mathews* v. *Eldridge*, 424 U.S. 319 (1976) ("upholding Social Security Administration's provision for notice and an opportunity to present rebutting evidence, but no evidentiary hearing, prior to the termination of federal disability benefits").

Assuming *arguendo* that this is the appropriate level of process for the termination of government contracts, on its face, the language of the FAR passes muster under the Fifth Amendment and the APA. The factors listed in FAR §49.402-3(f) are substantially comprehensive, and when considered together, are fair and pragmatic indicators of a contractor's ability to meet its obligations to the Government. The procedure defined in the FAR, and particularly consideration of the FAR §49.402-3(f) factors required by the plain language of the regulation, serves as an "initial check against mistaken deprivations." *Brock* v. *Roadway Express*, 481 U.S. 252, 261-62 (1987). *See also Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545-46, 552 (1985); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

The Federal Circuit's interpretation, however, creates problems on several levels. First, the opinion departs from the plain language of the regulation and instead holds that government contractors are not entitled to the notice and pre-deprivation hearing provided by FAR §49.402-3(e)(1). *See* 79 F.3d at 135 (Pet. 8a-9a). Additionally, as the FAR "does not confer rights on a defaulting contractor," *id.*,[2] should the

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[2]*Cf.* JOHN CIBINIC, JR. AND RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS at 25-26 (3d ed. 1994) (discussing cases in which procurement regulations

contracting officer fail to consider one or more of the FAR §49.402-3(f) factors in his pre-deprivation hearing, then his conduct may be held to be neither arbitrary nor capricious, regardless of whether the failure to consider the factor was prejudicial to the contractor. *See id.* Finally, nothing in the FAR suggests that once the Government has accorded a contractor due process on one occasion, it has discharged its duty to comply with the Constitution or the APA on subsequent occasions.

Contrary to the Government's representation, *see* Br. Opp. at 5, the Board of Contract Appeals cases cited by the Federal Circuit only concern controversies in which the failure to consider one of the FAR §49.402-3(f) factors did not create prejudice for the contractor. *DCX* v. *Perry* presents a different case: the termination contracting officer's failure to consider any explanation for the continued delay resulted in severe prejudice which DCX has been attempting to rectify through post-deprivation procedures for more than eight years.[3]

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having the "force and effect of law" pursuant to the *Christian* doctrine, as does the FAR, have been applied to benefit contractors).

[3]Although the Federal Circuit emphasizes that the contracting officer had not received an explanation for DCX's delay, 79 F.3d at 135 (Pet. at 9a), the record before the Board reflects that DCX had faxed an explanatory memorandum to its contact at the Defense General Supply Center, the termination contracting officer's supervisor, and that the memorandum was on that supervisor's desk at the time the notice of termination issued. The memorandum explained that the Defense Priorities and Allocations ["DPAS"]-caused delay, for which the government had already granted DCX a

The Federal Circuit, by inappropriately expanding the Boards of Contract Appeals' pragmatic *de minimis* rule, has effectively eliminated the specific and exclusive vehicle for ensuring due process to government contractors in the default termination process.[4] The prejudice which results from a termination contracting officer's failure to consider relevant information as directed by the FAR gives rise not only to a violation of the APA, as discussed in the Petition, but also to a violation of Constitutional due process.

PETITIONER'S CONSTRUCTION OF THE FAR AS SUBJECT TO THE APA AVOIDS THE UNNECESSARY DUE PROCESS ISSUES RAISED BY THE FEDERAL CIRCUIT'S HOLDING

Denial of Constitutional due process to DCX and due process under the APA lies not in any structural or linguistic defect of the FAR, but in the Federal Circuit's holding that

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forbearance, had lasted longer than originally anticipated, that the DPAS-caused delay had been resolved, and that testing would be completed within 72 hours. This information was available to the termination contracting officer and he would have discovered it had he conducted a pre-deprivation hearing as contemplated by FAR §49.402-3(e)(1). The contracting officer testified that he made no inquiry because believed he had no duty to do so; the Federal Circuit has affirmed that view. *See* 79 F.3d at 135 (Pet. at 9a).

[4]The government of the United States is immune from common law actions for breach of contract. The sole and exclusive remedy for contractors lies under the Contract Disputes Act, 41 USC §601 *et seq.* and its implementing regulations, including the FAR.

contractors are neither entitled to the protection of the pre-deprivation hearing provided by FAR §49.402-3(e)(1) nor the substantive considerations enumerated in FAR §49.402-3(f). Although the Federal Circuit may give deference to the contracting officer's view that he has no legal duty to conduct either a pre-deprivation hearing or to evaluate the criteria enumerated in FAR §49.402-3 while effecting such a hearing, deference cannot preserve an interpretation which yields unconstitutional results.

Regulations are governed by the same rules of construction which apply to statutes. *See* 1A SUTHERLAND ON STATUTORY CONSTRUCTION at §31.06 (Norman J. Singer, ed., 5th ed. 1992). One of the preeminent canons of statutory construction requires that a statute or regulation be construed so as to avoid Constitutional questions. *See National Labor Relations Board* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979) (citing *Murray* v. *The Charming Betsy,* 2 U.S. (2 Dallas) 64, 118 (1804); *Machinists* v. *Street,* 367 U.S. 740 (1961). The plain language of FAR §49.402-3, particularly the use of the phrase "shall consider" demonstrates that the FAR must be construed as requiring the consideration of all the factors enumerated in FAR §49.402-3(f) prior to terminating a contract for default. *See, e.g.,* 3 SUTHERLAND ON STATUTORY CONSTRUCTION at §§57.01-.03. Any default termination in which all of these factors have not been considered, where such failure is material, should be set aside as invalid agency action pursuant to the APA. *See* 5 USC §706(2)(D). Petitioner's interpretation of the FAR is consistent with both the plain language of the regulation and the APA, while avoiding the Constitutional due process question; this is the approach which should govern all federal government contracting.

UNDER THE FEDERAL CIRCUIT'S OPINION, EVERY GOVERNMENT CONTRACTOR MAY BE SUBJECTED TO A DEFAULT TERMINATION WHICH VIOLATES DUE PROCESS

The power and scope of the Federal Circuit's opinion is extraordinary. It exposes every government contractor to the possibility of a termination for default without: (1) the benefit of the pre-deprivation hearing contemplated by the framers of the FAR in 48 CFR §49.402-3(e)(1), and this Court in *Mathews* as well as numerous other decisions, *see, e.g., Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); (2) consideration of the factors enumerated in the FAR at 48 CFR §49.402-3(f); and (3) under circumstances which may well render subsequent judicial review meaningless.

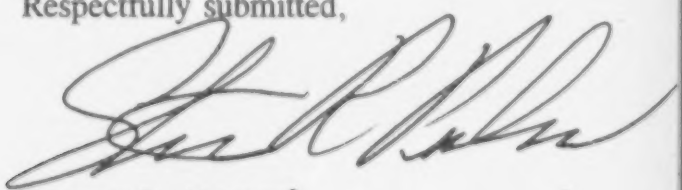
Government contractors invest considerable property resources in the performance of their contracting activities. Terminations for default impose extreme hardships upon government contractors, particularly small business contractors such as DCX. It is for this reason that the Courts have historically viewed terminations for default as drastic and draconian in nature. *See, e.g., Darwin Constr. Co.* v. *United States,* 811 F.2d 593 (Fed. Cir. 1987); *DeVito* v. *United States*, 188 Ct. Cl. 979, 413 F.2d 1147 (1969); *J.D. Hedin Constr. Co.* v. *United States,* 187 Ct. Cl. 571, 408 F.2d 424 (1969); *Schlesinger* v. *United States,* 182 Ct. Cl. 571, 390 F.2d 702 (1968).

The Federal Circuit's Opinion in *DCX* v. *Perry* marks not only a significant departure from the spirit of these cases; the effect of the holding on government contractors also offends the sense of fair play to the individual this Court has historically sought in due process cases. *See, e.g., United*

States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993); *Loudermill*, 470 U.S. 532; *Mathews*, 424 U.S. 319; Fuentes v. *Shevin*, 407 U.S. 67 (1972); *Goldberg*, 397 U.S. 254; *Sniadach, 395 U.S. 337; Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951). *DCX* v. *Perry* is the Federal Circuit's first published opinion concerning a contractor's procedural rights under the FAR's default termination provisions and is already considered of such significance that it has been included in the Federal Contracts Reporter. *See* 40 FCC ¶76,901.

For the foregoing reasons, this Court should issue a Writ of Certiorari and reverse the decision of the Court of Appeals for the Federal Circuit.

Respectfully submitted,



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BRIEF *AMICI CURIAE* OF THE COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY, and DEFENDERS OF PROPERTY RIGHTS ** IN SUPPORT OF PETITIONER

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CONTRACT ELECTRONICS
ASSOCIATION
OPHIR CORPORATION

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fifth Amendment requires a government agency to provide notice and a pre-deprivation hearing before terminating a procurement contract for default?

2. Whether the Due Process Clause of the Fifth Amendment prohibits government agencies from arbitrarily and capriciously terminating contracts for a delay caused by the government?

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No. 96-252

In The
Supreme Court of the United States
October Term, 1996

DCX, INC.,
Petitioner,

vs.

WILLIAM J. PERRY,
SECRETARY OF DEFENSE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICI CURIAE* OF THE COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY, and DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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October 15, 1996

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Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of Petitioner.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual rights and liberty. Defenders of Property Rights engages in litigation across the county on behalf of its members to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders devotes a significant portion of its resources to litigation and has participated in *Lucas v. South Carolina Coastal Council, Dolan v. City of Tigard* and *Babbitt v. Sweet Home Chapter Communities for a Great Oregon* when they were before this Court.

The Colorado Association of Commerce and Industry is a statewide, broad based, member organization representing the Colorado business community.

STATEMENT OF THE CASE

Petitioner, DCX, Inc., is an established manufacturer of electrical components based in Franktown, Colorado. Petitioner has designed and built many complex electrical

systems for the federal government, including components for the Saturn V Apollo moon rocket, the Navy's standard missile system, and the "smart bomb" ordinance system for the F-16.

Petitioner was awarded three contracts by Respondent, Defense General Supply Center, for manufacture of electrical components which would be used in the TEMPER medical tents: two for electrical power supply and distribution systems and one for fluorescent light sets, the contract in dispute in this case. A dispute arose between the parties over the feasibility of some of Respondent's specifications for the power supply systems. During the negotiations between the parties to prevent a termination of the two power supply contracts for default, Petitioner proceeded with performance of the third contract for the light sets.

Under that contract, the light set design was to be tested and a First Article Test Report ("FATR") was to be submitted to ensure that the light sets met government standards. Petitioner subcontracted with Ball Aerospace Corporation ("Ball") to conduct the tests because it had the only facility in the region with the required capability.[1] Due to the tight delivery schedule, Petitioner proceeded with production before FATR approval, even though the costs of making changes to any parts which are required to obtain FATR approval are normally borne by it as the contractor. Based on its long history in contracting with the government

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[1] Not only is Ball the only facility in the region with the capacity to do the required testing, it is one of the premier testing facilities in the county. Moreover, subcontracting with one of the few other laboratories with the same capability would have been commercially impracticable for Petitioner.

to design and build similar electrical devices, Petitioner believed that such a relatively simple apparatus would undoubtedly meet the government's criteria.

Ball, however, was delayed in testing the light assemblies due to an urgent, classified order by a separate government agency which had higher priority under the Defense Priorities and Allocations System, 15 C.F.R. §350 *et seq.* In light of the fact that the government itself caused the delay, Respondent granted Petitioner a twelve-day extension to allow Ball to complete the test and issue the report.

On the new deadline date, July 12, 1988, Ball was entering the final stages of the test procedure. Petitioner had sent a memo explaining that while the FATR would again be delayed due to yet another government project taking priority over Petitioner's lower-priority project, but that such delay would not prevent Respondent from meeting the first delivery date. Unfortunately, however, this time Petitioner and Respondent were embroiled in an acrimonious dispute regarding the other two contracts. Apparently in a fit of pique, rather than respond to explanation that the delay was again caused by the government, on July 13, 1996, Respondent simply terminated all three contracts -- the two disputed contracts plus the lighting contract not in any way involved in the dispute.[2]

Under the Government's Federal Acquisition Regulations ("FAR"), the terminating contract officer ("TCO")

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[2] Ironically, at the time the government terminated the lighting contract, the other contractor responsible for manufacturing the tents to house the lights was also behind schedule.

is required to evaluate a number of factors prior to terminating any contract, including, notably, whether the contract default was excusable given the totality of the circumstances. 48 C.F.R. §49.402-3(f). The FAR also specifically require the TCO *prior to* terminating a contract to consider the urgency for the contract fulfillment, the reasons proffered by the defaulting party, and the consequences to both parties as a result of contract default. *Id.*

In the instant case, there is no question that the TCO failed to follow the FAR. Indeed, the TCO testified at trial that not only did he not undertake the evaluation required by the FAR, but that he did not believe the factors relevant to the decision to terminate Petitioner's contract:

> JUDGE HARPER: In other words, the Government, whether it's you or whoever it is for the Government comes in and says stop what you're doing and hold that up, do this. If you had understood that was the reason that DCX was late in delivering this first article report, would it have changed your feelings about termination?
>
> WITNESS: I'd have to say no.

Tr. at 73, Pet. App. at 40.

Because Petitioner had been previously granted one extension on the contract, the TCO believed that he was not bound by FAR with respect to the instant contract termination. Tr. at 46-48, Pet. App. at 37-39. Accordingly, the TCO wrote the termination memorandum and had it approved within five hours without conducting any of the required inquiries. Tr. at 79-83, Pet. App. at 41-45.

SUMMARY OF ARGUMENT

Just three years ago this Court held that "the right to prior notice and a hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). As this Court explained:

> The purpose of this requirement [of due process] is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistake deprivations of property.

Id. at 50, *quoting Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

Certainly Petitioner in this case was not treated fairly. It received absolutely no notice whatsoever before the Respondent decided unilaterally to terminate the contract for default. The constitutional question presented for review, thus, is whether Respondent has infringed Petitioner's right to due process by failing to afford notice and a pre-deprivation hearing (*i.e.*, an opportunity to explain to the TCO the basis for the delay) prior to terminating the contract. The extent to which government agencies are bound by the requirements of the Due Process Clause in their dealings with contractors when terminating procurement contracts is presently "uncharted territory" for this Court.

The applicable principle for this issue would appear to be found in this Court's landmark decision in *Goldberg v.*

Kelly, 397 U.S. 254 (1970). *Goldberg* established that, in certain instances people deprived of property interests by government action have the right to notice and a hearing prior to the deprivation of the interests.

Subsequent to *Goldberg*, this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), established a balancing test for determining the circumstances in which a pre-deprivation hearing would be required. Under that test three factors are to be considered: (1) the nature of the private interest affected by the failure to provide procedural safeguards; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of any safeguards; and (3) the burdens imposed on the government of providing additional safeguards. *Id.* at 335.

This Court has applied the *Mathews* test in a number of instances including civil seizure of property pursuant to a drug offense, *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), and termination of teachers from a public school system, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

Despite the clear principles articulated by the *Goldberg/Mathews* Courts, the United States Court of Appeals for the Federal Circuit continues to render decisions at odds with this Court's holdings and other lower courts' holdings. For example, in addition to the decision below, the Federal Circuit also has refused to require a pre-deprivation hearing even in situations where a government contractor was facing suspension of bidding privileges -- a veritable death

sentence for a company relying on government contracts. *See, e.g., NKF Engineering v. United States,* 805 F.2d 372 (Fed. Cir. 1986); *ATL, Inc. v. United States,* 736 F.2d 677 (Fed. Cir. 1984).

The refusal of the Federal Circuit to require the government to afford due process in the context of government contracting is a problem of special importance because it is the court of review for all contract claims for money damages against the federal government under the Tucker Act. 28 U.S.C. § 1346. Thus, review by this Court is necessary to provide guidance to this important forum - the Federal Circuit (and the U.S. Court of Federal Claims) -- regarding whether a pre-deprivation hearing is required in suits involving government procurement contracting.

Equally important is the second issue raised in this Petition regarding the arbitrary and capricious nature of the contract termination that took place. As the name of the clause implies, due process is specifically designed to probe whether the process by which rights are infringed is fair. *Daniels v. Williams*, 474 U.S. 327, 331 (1985)(purpose of the Due Process Clause is to prevent government from abusing its power or employing it for purposes of oppression). Where the process afforded to terminate contracts is unfair, or when government decision makers succumb to private biases or interests, then clearly the Due Process Clause is implicated. The Due Process Clause, quite simply, forbids all deprivations of property by governmental action that is arbitrary,

unreasonable or violative of fundamental principles of fairness. U.S. CONST. Amend. V.

Thus, the issue in a due process case is not whether the government had the *power* to terminate the contract, but whether the deprivation of property has been accomplished in a manner protective of fundamental individual rights. In the present case, the government not only failed to follow its own rules for terminating the contract, but did so for arbitrary and abusive purposes, unrelated to any legitimate government interest.

Nevertheless, the court below upheld Respondent's failure to afford due process protections to Petitioner. Without guidance from this Court with respect to these important constitutional issues, the door is thus wide open for government to deprive private contractors of their constitutional right to due process in an arbitrary and unfair manner. Accordingly, *amici curiae* strongly urge this Court to grant Petitioner the writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES AN ISSUE OF CRITICAL IMPORTANCE TO GOVERNMENT CONTRACTORS -- WHETHER THE DUE PROCESS CLAUSE REQUIRES A GOVERNMENT AGENCY TO PROVIDE NOTICE AND A PRE-DEPRIVATION HEARING PRIOR TO TERMINATING A CONTRACT FOR DEFAULT.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. Amend. V.

The essential guarantee of the Due Process Clause is that of fairness. Government actions that deprive an individual of life, liberty, or property must be fundamentally fair. In practical terms, what the Due Process Clause means is that at a minimum when facts or issues are disputed, then the person whose interests are at stake must be granted a fair procedure to resolve the dispute. *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993).

In the present case, the procedure utilized to terminate the contract -- depriving Petitioner of its property -- was decidedly not fair. First, there was no notice whatsoever of Respondent's intent to terminate the contract. This meant that

any steps Petitioner could have taken to have avoided the default were foreclosed. The purchasing contracting officer ("PCO") simply conducted a cursory inquiry and filled out the necessary paperwork to effect termination by default of the contract? The notice of intent to terminate the contract was the termination itself.[3]

The injury to Petitioner resulting from this lack of prior notice is palpable. Petitioner did not have an opportunity to comment on the decision of the PCO nor to cure the alleged defects upon which the PCO purported to base his termination decision. Petitioner was presented with a costly (in terms of money and potential damage to reputation) termination by default as a *fait accompli.*[4]

In *Mathews v. Eldridge,* 424 U.S. 319 (1976), this Court set out a balancing test for determining the circumstances in which a pre-deprivation hearing would be required. Under that test three factors are to be considered:

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[3] The TCO testified at trial that because Petitioner had been already given one extension, he believed that he was not bound to inquire into the basis for the second delay. Tr. 45-47, 48, 61, 64. The logic in this reasoning appears to be that if the government treats a contractor fairly once, then the next time the government is entitled to be arbitrary. Needless to say, there is no basis in the Due Process Clause for such a principle.

[4] A termination by default is said to be the fault of the contractor, and results in the contractor losing all rights under the contract once it is terminated, no matter how much the contractor has already performed in reliance upon the contract. A termination by convenience, on the other hand, is taken as a termination at the will of the government, and gives the contractor certain rights to reimbursement. *See, e.g., State of Florida, Dept. of Insurance v. United States,* 81 F. 3d 1093 (Fed. Cir. 1996)(termination by default could not be converted into termination by convenience where no injury was shown); *Ellett Construction Co., Inc. v. United States,* 93 F.3d 1537, 1547 (Fed. Cir. 1996)(contract canceled for convenience allowed contractor to be reimbursed for costs and profits).

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Application of these factors strongly suggests that Petitioner should have been entitled to a pre-deprivation hearing (such as an opportunity for Petitioner to explain to the TCO) prior to the termination of its contract:

A. SUBSTANTIAL PRIVATE INTERESTS WILL BE AFFECTED BY THE OFFICIAL ACTION.

Parties contracting with the government have a legitimate interest in the procedure utilized by government agencies for terminating contracts. This is because contracts often establish "legitimate claims of entitlement" recognized as property. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Indeed, courts routinely enforce contracts, and award damages against those who go back on their word. Moreover, the Constitution itself protects contracts. Article I, section 10, clause 1 provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Likewise, the

government may be required to pay "just compensation" under the Takings Clause of the Fifth Amendment for actions that deprive an owner of his contract. *Lynch v. United States*, 292 U.S. 571, 579 (1954).[5]

Moreover, the economic interests of the contracting party with the federal government often constitutes a significant portion of the contracting company's entire business. The financial impact on the Petitioner in this case as a result of the challenged contract cancellation has been significant. Not only has it resulted in no payment being received for performance already rendered, but additionally, and perhaps more importantly, Petitioner relies heavily on government contracts for its business. Termination by default may also have a permanent chilling effect on the future ability of Petitioner to contract with the federal government.

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[5] This Court has explicitly recognized that intangible property rights are deserving of Fifth Amendment protection. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), this Court noted that: "we are mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1961), *quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

B. THERE IS A HIGH RISK OF ERRONEOUS DEPRIVATION OF THE PRIVATE INTERESTS WITHOUT PROCEDURAL DUE PROCESS OR EQUIVALENT PROCEDURES, AND THE VALUE OF PROVIDING ADDITIONAL SAFEGUARDS IS SIGNIFICANT.

Under the holding of the court below, the risk of erroneous termination facing any government contractor is high. For if the contracting officer only performs a cursory inquiry, which is less than the requirements under the FAR, there is no way for the contractor to try to prevent a default termination from being ordered by the contracting officer based on inadequate findings. Allowing contractors to have notice and a pre-deprivation hearing would make it more difficult for the contracting officer to in fact perform inadequate inquiries, such as occurred in the instant case, and it would tend to have prevented a default termination of Petitioner's contract without valid reason.

Moreover, as pointed out in the Petition, because government contracts represent a substantial portion of the federal budget, a process that enables government to procure goods and services efficiently which requires certainty in the process, should be encouraged.

C. PROVIDING ADDITIONAL SAFEGUARDS WOULD ALSO BENEFIT THE GOVERNMENT.

As discussed above, the government's interest in contracting with suppliers such as Petitioner is the efficient ordering and procurement of needed goods and services. This interest would be *enhanced* if notice and a pre-deprivation hearing were provided as required by applicable regulations. The arbitrary and capricious acts of the government in this case not only denied without due process the rights of Petitioner, but also were the least efficient method of obtaining the goods originally contracted for by the government. A pre-deprivation hearing would allow the contractor to at least partially perform the contract, thereby reducing the delay and costs of finding new suppliers.

Indeed, the government has already provided an efficient and effective means for providing due process, by requiring the equivalent of notice and a prehearing deprivation hearing in the FAR. Thus, it would appear that the government recognizes its interest are served by using every means possible to encourage performance of contracts.

Finally, since an Armed Services Board of Contract Appeals ("ASBCA") hearing is always available after the entry of default termination, failure to provide notice and a pre-deprivation hearing (or to comply with the FAR) requires potentially a greater expenditure of government resources than would be expended by simply requiring the PCO to seek an

explanation from the contracting party prior to terminating the contract, a pre deprivation hearing has the added benefit of potentially saving government recourses.

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT SHOULD ALSO PROHIBIT GOVERNMENT AGENCIES FROM ARBITRARILY AND CAPRICIOUSLY TERMINATING CONTRACTS FOR DEFAULT.

A contract with the federal government is not like a contract between private parties, because unlike private parties who can breach a contract at will, the government owes a duty of fairness to its citizens even when it contracts with them. Specifically, the Due Process Clause of the Fifth Amendment imposes a duty which prohibits the government from acting arbitrarily and capriciously whenever it deprives a person of property, in this case, contract rights. U.S. CONST. Amend. V.

Similarly, as discussed above, to guard against the arbitrary or unwarranted termination of contracts, the government is required to evaluate a number of factors contained in the Federal Acquisition Regulations:

> 1. The terms of the contract and applicable laws and regulations.
>
> 2. The specific failure of the contractor and the excuses for the failure.
>
> 3. The availability of the supplies or services from other sources.

> 4. The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
>
> 5. The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.
>
> 6. The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.
>
> 7. Any other pertinent facts and circumstances.

48 C.F.R. §49.402-3(f).

Not only is the government bound by the applicable regulations, but compliance with these factors assures the contracting parties that the contract termination process is fair. Moreover, compliance with the FAR helps insure that the termination is not based on arbitrary, capricious or abusive purposes. In the instant case, analysis of these factors was *not* undertaken and the contract was *arbitrarily* canceled for what appear to be for spiteful purposes.

The court below erroneously held that FAR and the applicable regulations in 48 C.F.R. Sec. 49.402-3(f) cannot be viewed as binding objective standards guaranteeing due process to private contractors in the termination of contracts with the government. Further, the court below erroneously held that the FAR conferred *no rights* on the private contracting party:

> The second regulatory provision on which Petitioner relies, 48 C.F.R. § 49.402-3(f), requires a contracting officer to consider various factors before exercising his discretion to terminate a contract when the contractor is in default. . . . [T]he factors in section 49.402-3(f) that contracting officers are directed to consider before terminating contracts are not prerequisites to a valid termination.

Pet. App. at 8a.

In sharp contrast with the holding of the court below, however, this Court has repeatedly held that government regulations have the "force and effect" of law and do in fact confer enforcement rights on its citizens. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). As this Court explained in *Udall v. Tallman*, 380 U.S. 1 (1965), the public relies and makes economic decisions based on government rules and laws and even practices:

> [G]overnment is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize in a regular practice. . . .

Id. at 17, *quoting United States v. Midwest Oil Co.*, 236 U.S. 459, 472-3 (1914).

The decision below flies in the face of this reasoning by upholding or "crystallizing" an arbitrary termination process at odds with the government's own long-standing, published regulations (FAR). Indeed, the clear purpose

behind the FAR is to ensure that the government *avoid* capriciously terminating a contract without undertaking a thoughtful review of various factors set forth in the applicable regulations. In light of this plainly prescribed process contained in the FAR, which essentially embody the requirements of due process, it is strange, indeed, for the lower court to suggest that the FAR is merely advisory, and that the government agency can at its discretion decide whether or not to act fairly. Surely if constitutional due process means anything, it must mean that when government processes are fair, then they must be followed in every instance, and not just when the government is so inclined.

CONCLUSION

Accordingly, for all the foregoing reasons, *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari and provide guidance to the lower courts regarding the role, if any, of the Due Process Clause in the context of government procurement contracts.

Respectfully submitted,

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